

Supreme Court, U. S.
FILED

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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1977.

No. 77 - 980

**ALBERT A. LEWIS, on Behalf of Himself and All Others
Similarly Situated,**

Appellant,

v.

**JAMES L. COWEN, NEIL P. SPIERS and WYTHE D. QUARLES,
JR., Members of the Railroad Retirement Board**

and

RAILROAD RETIREMENT BOARD.

**Appeal From Judgment of the United States District Court
for the Eastern District of Pennsylvania.**

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

OPINIONS DELIVERED.

Five opinions were delivered in the courts below. None of them appear to have been reported. They are appended hereto and marked chronologically as Appendix A1 through Appendix A5.

JURISDICTION.

Jurisdiction of the Supreme Court is based on the denial of an injunction by a three-judge court that was convened pursuant to 28 U. S. C. § 2282.

(i) This is a suit seeking mandamus, an injunction and other equitable relief, and a judgment declaring that a sexually discriminatory provision in Section 1 of the Railroad Retirement Act of 1937, as amended by § 205 of the Act of July 31, 1946, c. 709, 60 Stat. 727 [formerly 45 U. S. C. § 228b(a)], violates the Fifth Amendment of the United States Constitution and the Civil Rights Act of 1964. The case was brought pursuant to 28 U. S. C. § 1337 (commerce clause), 28 U. S. C. § 1343 (deprivation of civil rights), 28 U. S. C. § 1361 (mandamus), and 28 U. S. C. §§ 2201 and 2202 (declaratory judgments).

(ii) The judgment sought to be reviewed was entered on October 19, 1977. Notice of appeal was filed in the U. S. District Court for the Eastern District of Pennsylvania on November 11, 1977.

(iii) Jurisdiction of this appeal is conferred by 28 U. S. C. § 1253.

(iv) Cases believed to sustain jurisdiction of the Supreme Court include *Carter v. Stanton*, 405 U. S. 669, 92 S. Ct. 1232, 31 L. Ed. 2d 569 (1972); *Craig v. Boren*, 429 U. S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976); *Weinberger v. Wisenfeld*, 420 U. S. 636, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975).

(v) The validity of a former statute of the United States is involved. Section 1 of the Railroad Retirement Act of 1937, as amended by § 205 of the Act of July 31, 1946, c. 709, 60 Stat. 727, effective January 1, 1947 [formerly 45 U. S. C. § 228b(a)], provided that pensions shall be payable, inter alia, to:

"2. Women who will have attained the age of sixty and will have completed thirty years of service.

"3. Men who will have attained the age of sixty and will have completed thirty years of service . . . but the annuity of such men . . . shall be reduced by $\frac{1}{180}$ for each calendar month that he . . . is under age sixty-five when the annuity begins to accrue.

"4. Individuals having a current connection with the railroad industry, and whose permanent physical or mental condition is such as to be disabling for work in their regular occupation, and who (i) will have completed twenty years of service or (ii) will have attained the age of sixty."

(*Emphasis supplied*).

Copy of the civil judgment is appended hereto and marked Appendix B1. Copy of the notice of appeal is appended hereto and marked Appendix B2.

QUESTIONS PRESENTED.

The questions presented by this appeal are as follows:

1. Does Section 1 of the Railroad Retirement Act of 1937, as amended by Section 205 of the Act of July 31, 1946, c. 709, 60 Stat. 727 [formerly 45 U. S. C. § 228b(a)], insofar as it discriminates in payments to a substantial number of railroad pensioners solely on the basis of their sex violate the Fifth Amendment of the United States Constitution?

2. Was the sexually discriminatory provision in the above statute superseded by Title VII of the Civil Rights Act of 1964?

STATEMENT OF THE CASE.

Plaintiff is a retired railroad employee who receives a reduced pension from the Railroad Retirement Board solely because he is male. On behalf of himself and others similarly situated, he seeks to have that part of former § 1 of the Railroad Retirement Act of 1937, as amended by § 205 of the Act of July 31, 1946, c. 709, 60 Stat. 727 [formerly 45 U. S. C. § 228b(a)] that imposes the reduction declared unconstitutional because it violates the Fifth Amendment of the United States Constitution. He also seeks to have it declared invalid on the ground that it was superseded by Title VII of the Civil Rights Act of 1964. In addition, he seeks an order requiring the Board to recalculate his pension benefits without the statutorily imposed deduction, payment of back benefits and other equitable relief.

Defendant filed an answer that admits most of the factual allegations in the complaint but denies that the statutory scheme of discrimination by sex is in violation of the Constitution or the Civil Rights Act of 1964. Defendant then moved for summary judgment. The trial judge entered an order extending the time for plaintiff to move for a determination as to whether the case is to be maintained as a class action until 30 days after disposition of the motion for summary judgment.

Subsequently, the trial judge granted defendants' motion for summary judgment, but the U. S. Court of Appeals for the Third Circuit vacated the judgment and remanded with directions that a three-judge court be convened to hear the case.

Plaintiff then moved for an order determining that the case may be maintained as a class action. This motion was never ruled upon. However, the three-judge panel granted defendants' motion for summary judgment. Plaintiff then appealed to the Supreme Court.

Facts.

Former § 1 of the Railroad Retirement Act of 1937, as amended by § 205 of the Act of July 31, 1946, c. 709, 60 Stat. 727, effective January 1, 1947 [formerly 45 U. S. C. § 228b(a)], provides that pensions shall be payable, *inter alia*, to:

"2. Women who will have attained the age of sixty and will have completed thirty years of service.

"3. Men who will have attained the age of sixty and will have completed thirty years of service . . . *but the annuity of such men . . . shall be reduced by $\frac{1}{180}$ for each calendar month that he . . . is under age sixty-five when the annuity begins to accrue.*

"4. Individuals having a current connection with the railroad industry, and whose permanent physical or mental condition is such as to be disabling for work in their regular occupation, and who (i) will have completed twenty years of service or (ii) will have attained the age of sixty." (Emphasis supplied.)

Subsequently, the Railroad Retirement Act of 1937 was further amended so as to eliminate this sexually discriminatory classification, but only for railroad pensioners whose annuities began to accrue after July 1, 1974. Act of July 10, 1973, Pub. L. 93-69, Title I, § 101, 87 Stat. 162, 45 U. S. C. § 228b(a). New pensioners with 30 years of service, male and female alike, may now retire at age 60 with no reduction of benefits.

Therefore, the challenged statutory provision applies only to employees of a railroad in interstate commerce who:

- (1) have had 30 or more years of service;

- (2) retired between January 1, 1947 and July 1, 1974;
- (3) were between ages 60 and 65 when they retired; and
- (4) were not disabled for work in their regular occupations.

Each *male* member of this class of railroad employees has had his retirement pension reduced solely because of his sex. But railroaders, male and female alike, contribute (or pay premiums) at the same rate on their earnings to the fund from which their pensions are paid. 26 U. S. C. §§ 3201-3202.

The only thing in the legislative history of the statute that is pointed to by defendants to justify its sexually discriminatory classification of pensioners is testimony given by Murray Latimer, then chairman of the Railroad Retirement Board, to the House Committee on Interstate and Foreign Commerce on January 31, 1945. Latimer asserted, without any supporting facts, that (1) the efficiency of women on jobs outside the home tends to become impaired at an earlier age than in the case of men, and (2) the proportion of women unable to engage in regular employment at age 60 is larger than the proportion of men at age 65.

Plaintiff took the deposition of Dr. Herman P. Miller, who for many years was Chief of the Population Division of the U. S. Bureau of the Census, is the author of four books on income distribution in the United States, and who has received both the gold and silver medals (the two highest awards that the Department of Commerce gives for scientific work) from the U. S. Department of Commerce for accomplishments in the field of income distribution. He has also been a professor of economics at U. C. L. A., Temple University and George Washington University. Pp. 3-9 of Dr. Miller's deposition. Dr. Miller

testified concerning the results of studies he has made of the comparative earnings of men and women in the railroad industry and other industries in the United States, and of the comparative employability of men and women at ages 60 to 65.

Plaintiff also presented affidavits by Dr. Miller dated July 23, 1975, and March 30, 1977. Defendant submitted an affidavit of R. F. Butler, secretary of the Railroad Retirement Board, dated July 7, 1975, and an affidavit of Abraham Benjamin, director of research of the Railroad Retirement Board, dated July 8, 1975.

Dr. Miller, in his deposition and subsequent affidavits, presented and explained the following facts, all of which are supported by the results of United States Government studies and are documented in United States Government publications:

1. The life expectancy at age 60 of women exceeds that of men in the United States, and this has been so since 1930 at least. Pp. 11-13 of Dr. Miller's deposition.

2. According to statistics published by the U. S. Bureau of the Census, the unemployment rate for men aged 60-64 was substantially higher than that for women in 1940 (9.6% to 6.8%). In addition, more men than women were on public emergency work (5.6% to 5%). Page 2 of Dr. Miller's affidavit of July 23, 1975. This was the most recent unemployment data available in 1946 when the legislation in question was enacted. And, according to the U. S. Department of Labor's 1973 Manpower Report to the President, the unemployment rate for men aged 55 to 64 in 1947 was greater than that for women (2.9% to 2.6%). Page 94 of Dr. Miller's deposition; Page 2 of Dr. Miller's affidavit of July 23, 1975.

3. According to statistics published by the U. S. Department of Labor, the unemployment rate for men aged 60-64 has been greater than that for women in 10 of the last 12 years for which such statistics are available (1962 to 1974). In the two years in which women had a higher unemployment rate (1968 and 1974), the difference was only .2%. In the ten years in which men had a higher unemployment rate, the average difference was between .5% and 1%. Pp. 15-19 of Dr. Miller's deposition.

4. Statistics published by the U. S. Department of Labor have shown consistently that three or four times as many men as women, aged 60-64, who are not working or looking for work give ill health as the reason therefor. These figures cover the years 1967 through 1974, all of the years for which such statistics are available. Pp. 19-21 of Dr. Miller's deposition.

5. Statistics from the U. S. Department of Labor for the same years show consistently that the percentage of men, aged 60-64, who are not working or looking for work because they are discouraged and don't think that they can find a job exceeds that of women in the same age bracket. Dr. Miller concluded that poor health and discouragement about the ability to find a job is more of a problem for men than for women in the 60-64 age group. Pp. 21-23 of Dr. Miller's deposition.

6. Statistics from the U. S. Department of Labor for the same years show consistently that the percentage of men aged 60-64 who want work but who are not looking for work because of ill health is substantially greater than that of women in the same age bracket. Pp. 23-24 of Dr. Miller's deposition.

7. Statistics from the U. S. Department of Labor for the years 1964 through 1973, all of the years for which such statistics are available, consistently show that proportionately twice as many men as women, aged 60-64, work only part time because of illness or disability. Pp. 24-27 of Dr. Miller's deposition.

8. Statistics from the U. S. Department of Labor for the years 1964 through 1973, all of the years for which such statistics are available, consistently show that a much greater percentage of men than women, aged 60-64, who are not employed at all, don't work because of illness or disability. Pp. 27-29 of Dr. Miller's deposition.

9. According to a special retirement history study conducted by the U. S. Department of Health, Education and Welfare in 1969 of persons aged 58 to 63, women generally reported that they were in better health than men. Pp. 34-35, 90-91 of Dr. Miller's deposition.

10. Other statistics from the same special retirement history study conducted by the U. S. Department of Health, Education and Welfare indicate that men aged 58 to 63 have not only more disability but also more serious disability to the extent of limiting their ability to work. Pp. 35-37 of Dr. Miller's deposition.

11. Statistics from the same special retirement history study conducted by the U. S. Department of Health, Education and Welfare show that a larger percentage of men, aged 58 to 63, receive hospital care than women. Pp. 37-38 of Dr. Miller's deposition.

12. Statistics from the U. S. Bureau of the Census taken from the 1940, 1950, 1960 and 1970 decennial

censuses show that the difference between the earnings of men and women was greater in every other industry in the United States than it was in the railroad industry, with the single exception of the mining industry in 1950. The number of industry classifications used was 150. In most cases the difference between earnings for men and women was appreciably greater than it was in the railroad industry. Of note is the fact that the difference between the earnings of men and women employed by the Federal Government and the Postal Service was greater than it was in the railroad industry. Pp. 39-46 of Dr. Miller's deposition; Page 5 of Dr. Miller's affidavit of June 23, 1975.

13. Statistics published by the U. S. Bureau of the Census indicate that the reason for the difference (15 to 20 percent) in earnings between men and women in the railroad industry is accounted for by the different types of jobs held by women. Women predominate in clerical positions, whereas men predominate in blue-collar jobs. This is true also in the Federal Government, in the Post Office and in industry generally. Pp. 46-65, 74-75 of Dr. Miller's deposition; Page 5 of Dr. Miller's affidavit of July 23, 1975.

14. In 1940 three percent of railroad workers were women. In 1950 it was five percent. In 1960 it was six percent. In 1970 it was seven percent. Page 49 of Dr. Miller's deposition.

15. Statistics from the Federal Equal Employment Opportunity Commission for the years 1966 through 1973, all of the statistics that are currently available, show that since the passage of the Civil Rights Act of 1964 there has been a very significant

upgrading of the black labor force in the railroad industry, but that there has been very little change in the job categories for women. Pp. 65-71 of Dr. Miller's deposition.

16. Statistics published by the Railroad Retirement Board for the years 1968 (the first year for which such figures are available) to 1974 show that in every year women, aged 60-65, who were awarded new annuities, received higher annuities than their male counterparts, i.e., until 1974 when the discriminatory provision reducing pensions for males was eliminated. Page 73 of Dr. Miller's deposition; Page 1 of Dr. Miller's affidavit of March 30, 1977.

17. Statistics published by the Railroad Retirement Board show that the average monthly annuity paid to railroaders, old and new combined, who retired between ages 60 and 65 with 30 years of service was greater for women than for men from 1963 (the first year for which such statistics are available) through 1970. Beginning in 1971 the average monthly annuity became slightly greater for men, but only because women live longer. A greater proportion of women than men who retired in earlier years when annuity payments were lower are still alive, thus lowering the averages for all female annuitants. Page 1 of Dr. Miller's affidavit of March 30, 1977.

18. The average female annuitant who had the advantage of the sexually discriminatory provision in the statute not only collected a larger annuity when she retired, but also collected it for a longer period of time than her male counterpart similarly situated. Page 2 of Dr. Miller's affidavit of March 30, 1977.

Defendants, by affidavit of Abraham Benjamin, director of research of the Railroad Retirement Board, introduced the following facts that were gathered from statistics compiled by the Railroad Retirement Board:

1. The average monthly creditable compensation of pensioners with 30 years of railroad service was greater for males in 1944, and in each of the years 1961 through 1973.

2. The average *unreduced* monthly pensions for railroad employees with 30 years of service was greater for males than females in 1944, and in each of the years 1961 through 1973.

3. The average monthly annuity being received by railroad pensioners, old and new, with 30 years of service who retired at ages 60-64 was greater for women in the years 1963 through 1970, and greater for men in the years 1971 through 1973.

4. Female railroad employees are concentrated in clerical positions.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

More than 25,000 male railroad retirees are currently receiving reduced pensions because of the continued application by the Railroad Retirement Board of the statute herein challenged. Although the statute was repealed in 1973, the repeal affects only railroaders who retired after July 1, 1974. Those male railroaders who had the misfortune to retire prior thereto, i.e., between January 1, 1947, and July 1, 1974, continue to suffer, solely because of their sex, a reduction in pension payments, and will continue so to suffer unless the Supreme Court grants them relief.

This case has important social implications in the area of equal rights under the law. Retired railroad employees, male and female alike, contributed equally to their pension fund, but receive benefits unequally therefrom due to an improvident and, plaintiff submits, unconstitutional sexually discriminatory act of Congress.

Moreover, under Title VII of the Civil Rights Act of 1964, as amended, neither private employers, nor governments, nor governmental agencies, may sexually discriminate in the application of their pension plans. 42 U. S. C. §§ 2000e(a), (b), (f), 2000e-2(a), 2000e-16(a). *Rosen v. Public Service Electric and Gas Co.* (3rd Cir. 1973) 477 F. 2d 90 (pension plan of public utility company that permitted women to retire on full pension at earlier age than men); *Bartmess v. Drewrys U. S. A., Inc.* (7th Cir. 1971) 444 F. 2d 1186, cert. den., 404 U. S. 939, 92 S. Ct. 274, 30 L. Ed. 2d 252 (pension plan of private company that required women to retire at earlier age than men); *Chastang v. Flynn and Emrich Co.* (4th Cir. 1976) 541 F. 2d 1040 (pension plan of private company that provided for faster vesting of women's benefits); *Mixson v. Southern*

Bell Telephone and Telegraph Co. (N. D. Ga. 1971) 334 F. Supp. 525 (pension plan of public utility company that fixed earlier retirement age for women); *Fitzpatrick v. Bitzer* (D. Conn. 1974) 390 F. Supp. 278, aff'd in part and rev. in part at 519 F. 2d 559 (2nd Cir. 1975), aff'd in part and rev. in part at 427 U. S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (pension plan of State of Connecticut that permitted women to retire earlier at full pension than men).

As the reported judicial decisions now stand, the railroad industry is the only industry in the United States in which it is lawful to discriminate in payment of pension benefits solely on the basis of sex. This doesn't seem right.

CONCLUSION.

Appellant submits that this appeal brings before the Supreme Court substantial federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

DAVID F. BINDER,
RAYNES, McCARTY AND BINDER,
Counsel for Plaintiff-Appellant.

APPENDIX A1.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-2876

ALBERT A. LEWIS, on behalf of himself and all others
similarly situated

v.

JAMES L. COWEN, NEIL P. SPIERS, and WYTHE D.
QUARLES, JR., members of The Railroad Retirement
Board

and

THE RAILROAD RETIREMENT BOARD

Memorandum Opinion.

Retirement benefits are computed differently for women than for men under the Railroad Retirement Act,¹ precipitating this class action by a retired male railroad employee against the Railroad Retirement Board for sex discrimination against men. Under this federal statutory computation women with thirty years of service enjoy full retirement benefits at age 60 while men with thirty years of service receive reduced benefits if they retire before age 65. Thus plaintiff has instituted a class action to have the

1. 45 U. S. C. § 228a, *et seq.*

statutory differential declared unconstitutional, its enforcement enjoined and to have full benefits restored prospectively and retroactively as to all members of the class. Defendants have answered plaintiff's complaint and have filed a motion for summary judgment. The motion has been briefed and oral argument has been heard. I find that after careful consideration of its merits, this case does not raise a substantial federal question in view of the recently decided case of *Kohr v. Weinberger*, 378 F. Supp. 1299 (E. D. Pa. 1974),² and that defendants' summary judgment motion must be granted.

Plaintiff retired from the employ of the Penn Central Transportation Company in 1964 at age 64 after thirty years of employment in the railroad industry and he now receives retirement annuity benefits monthly under the Railroad Retirement Act which is administered by the Railroad Retirement Board, an independent federal agency. Section 228b³ of the Act provides in pertinent part:

"(a) The following-described individuals, if they shall have been employees on or after the enactment date, and shall have completed ten years of service, shall, subject to the conditions set forth in subsection (b)-(d) of this section, be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in section 228a(a) of this title (but with the right to engage in other employment to the extent not prohibited by subsection (d) of this section):

2. I sat as one of the judges on the three-judge court in the *Kohr* case with Circuit Judge Van Dusen and District Judge Fogel.

3. Public Law 93-69, 87 Stat. 162, has amended 45 U. S. C. § 228b removing the compensational differential between men and women beneficiaries. However, the amendment does not apply to individuals whose annuities began to accrue prior to July 1, 1974.

1. Individuals who on or after the enactment date shall be sixty-five years of age or over.

2. Women who will have attained the age of sixty and will have completed thirty years of service.

3. Men who will have attained the age of sixty and will have completed thirty years of service, or individuals who will have attained the age of sixty-two and will have completed less than thirty years of service, but the annuity of such men or such individuals shall be reduced by $\frac{1}{180}$ for each calendar month that he or she is under age sixty-five when the annuity begins to accrue.

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Because plaintiff retired before his 65th birthday his retirement benefits were subject to the $\frac{1}{180}$ per month reduction formula of § 22b(a)(3), and he contends that since a woman having his employment background would be entitled to full retirement benefits at age sixty-four, he is being discriminated against because he is a man, in violation of the Fifth Amendment of The United States Constitution and Title VII of the 1964 Civil Rights Act, 42 U. S. C. § 2000e, *et seq.*

A constitutional challenge to a federal statute which seeks to enjoin its application is subject to the provisions of 28 U. S. C. §§ 2282, 2284 which require the convening of a three-judge court.⁴ A district court judge need not

4. 28 U. S. C. § 2282 reads:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

28 U. S. C. § 2284 reads in part:

"In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges

petition for the convening of a three-judge court, however, when the allegations of the petition for injunctive relief do not present a substantial constitutional question. *Ex parte Poresky*, 290 U. S. 30, 32, 54 S. Ct. 34 (1933); *Rothblum v. Board of Trustees*, 474 F. 2d 891 (3d Cir. 1973); *Richardson v. United States*, 465 F. 2d 844 (3d Cir. 1972); *Maruj v. United States*, 431 F. 2d 469 (3d Cir. 1970). A petition may raise an unsubstantial question because it fails to state a claim upon which relief can be granted, but "a finding of insubstantiality of a constitutional question is . . . one involving a more sophisticated judgment than that required to determine whether or not a complaint states a cause of action for injunctive relief." *Maruj v. United States*, supra, 431 F. 2d at 473. The Supreme Court recognized in *Ex Parte Poresky*, supra, that the substantiality of a federal question must be judged in view of whether it has a reasonable chance of surviving the tide of *stare decisis*.

"The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' *Levering & Garrigues Co. v. Morrin*, supra, *Hannis*

4. (Cont'd.)

the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) the district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

• • • • •

Neither the plaintiff nor the defendants have filed a motion to have a three-judge court convened.

Distilling Co. v. Baltimore, 216 U. S. 285, 288, 30 S. Ct. 326, 54 L. Ed. 482; *McGilvra v. Ross*, 215 U. S. 70, 80, 30 S. Ct. 27, 54 L. Ed. 95."

290 U. S. at 32, 54 S. Ct. at 4.

Considering the unique similarities between the instant case and *Kohr v. Weinberger*, supra, which was recently decided by a three-judge court sitting in this district and in whose decision I concurred as a member of that three-judge court, it is my view that under these circumstances the substantiality of this particular federal question is appropriately tested in the crucible of *Kohr's* factual and analytical matrix.

Kohr v. Weinberger, supra, has put to rest the constitutional issue raised by plaintiff's petition. Congress is not constitutionally bound to assume an arbitrary equality between the status and condition of women and men in the nation's work force and thereby ignore differences between the two groups which are germane to its legislative determinations.

Plaintiff contends that although Congress may have the power to give women such special consideration in drafting social welfare legislation, there is a material issue of fact as to whether there is a legally sufficient statistical basis to support the judgment of Congress in 1945 that women with thirty years of service in the railroad industry should be entitled to full retirement benefits at age sixty. The Act's legislative history shows that this judgment was based in part upon a 1943 report of the Social Security Board which stated that ". . . the proportion of women unable to engage in regular employment at age 60 is larger than the proportion of men at age 65." ⁵

5. Hearings on H. R. 1362 before the Committee on Interstate and Foreign Commerce, 79th Cong., 1st Sess. at 170 (1945).

In *Kohr*, we declined to apply the "close judicial scrutiny test" to the provision there in question, and despite plaintiff's argument to the contrary it is not the appropriate judicial standard here.⁶ Even assuming the appropriateness of engaging in a statistical inquiry to test the legislative judgment of Congress, plaintiff has not submitted any documentation to support his contention that § 228b is an arbitrary exercise of congressional power.⁷

6. As I view the current doctrinal divisions among the Justices of the Supreme Court as to the appropriate standards by which gender differentiating legislation should be evaluated, a majority of the Supreme Court Justices have not adopted the close judicial scrutiny tests. Nevertheless, because of the closeness of the divisions I have evaluated the legislation in issue by inquiring whether it would be valid under (1) the "close judicial scrutiny" test, *Frontiero v. Richardson*, 411 U. S. 677, 93 S. Ct. 1764 (1973), or (2) whether it meets the test that the classification must merely "... be reasonable, not arbitrary, and must rest upon some difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Stanton v. Stanton*, 43 U. S. L. W. 4449, 4451 (April 15, 1975); *Weinberger v. Wiesenfeld*, 43 U. S. L. W. 4939 (March 19, 1975); *Schlesinger v. Ballard*, — U. S. —, 95 S. Ct. 572 (1975); *Kahn v. Shevin*, 416 U. S. 351, 94 S. Ct. 1734 (1974); *Reed v. Reed*, 404 U. S. 71, 92 S. Ct. 251 (1971); *Royster Guano Co. v. Virginia*, 235 U. S. 412, 415 (1920). As I view these cases, the Supreme Court has not yet adopted the close judicial scrutiny doctrine as Justice Brennan had urged in his separate concurring opinion in *Frontiero v. Richardson*, *supra*. The close judicial scrutiny doctrine has been accepted by Justices Douglas, Brennan, White and Marshall. Of whichever tests would be utilized to measure the validity of the instant legislation I conclude that it is constitutionally valid. It must be emphasized that here, the instant legislation was designed to aid women employees, while in *Stanton*, *Frontiero* and *Reed*, the legislation was designed to preliminarily place women in disadvantageous positions as compared to their male counterparts. In view of the statistics which the court studied in *Kahn v. Shevin*, *supra*, which showed that as late as 1972 "that the financial difficulties confronting the lone woman . . . in any . . . state exceed those facing the man," I hold that no matter what test is used, this type of legislation is not violative of a male's constitutional rights under the Fifth Amendment.

7. During oral argument, plaintiff was granted two weeks to make such a submission to the Court but no exhibits or memoranda were thereafter filed.

In view of *Kahn v. Shevin*, 416 U. S. 351, 94 S. Ct. 1734 (1974), *Schlesinger v. Ballard*, — U. S. —, 95 S. Ct. 572 (1975) and *Kohr v. Weinberger*, *supra*, § 228b is constitutional on its face and the legislative history of that section forecloses any substantial dispute as to the reasonableness of the congressional determination that in fixing the retirement age for women they be given the consideration warranted by their actuarial longevity in the job market. I find that the instant petition does not raise a substantial federal question and that therefore the motion for summary judgment must be granted.⁸

A. LEON HIGGINBOTHAM, JR.

April 21, 1975

8. As to plaintiff's Title VII claim I do not find that the Equal Employment Opportunities Act has repealed by implication § 228b of the Railroad Retirement Act. *Cf. Gruenwald v. Gardner*, 390 F. 2d 591, 593 (2d Cir. 1968), *cert. denied*, 393 U. S. 982 (1968).

APPENDIX A2.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-2876

ALBERT A. LEWIS, *et al.*,

Plaintiffs

v.

JAMES L. COHEN, *et al.*,

Defendants

Opinion.

HIGGINBOTHAM, J.

March 5, 1976

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[1]

I. INTRODUCTION.

Plaintiff, a retired male railroad employee, claims that a statute passed in 1945 is now in violation of the Fifth Amendment and is also in contravention of Title VII of the Civil Rights Act of 1964 because it permitted women with 30 years of railroad service to retire at age 60 with full benefits, while men with similar service would have their annuity partially reduced if they retired between the ages of 60 and 64. This precise issue was previously decided by me on April 22, 1975, when I granted defendant's Motion for Summary Judgment and held that the statute in issue, § 228b(a)(3) of the Railroad Retirement Act of 1937, as amended (hereafter "Act"), did not illegally discriminate against male railroad employees. See Memorandum Opinion, *Lewis v. Cowen*, Civil Action No. 73-2876 (E.D. Pa., filed April 21, 1975).

[2]

I would have preferred to not add to the litany of words¹ answering those perceptions of some males who think that in some way they are now victims of monstrous injustice or unjustified "statutory favoritism"² whenever women today gain even some miniscule advantage over their male counterparts. But, due to an unfortunate administrative snafu, more now has to be written.

When my opinion of April 21, 1975 was filed, I was not aware of the fact that plaintiff's counsel had filed³

1. Brown, Emerson, Falk and Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 Yale L. J. 871 (1971) (hereafter "Brown"); Getman, "The Emerging Constitutional Principle of Sexual Equality," 1972 Sup. Ct. Rev. 157 (hereafter "Getman"); Johnston, "Sex Discrimination and the Supreme Court—1971-1974," 49 N. Y. U. L. Rev. 617 (1974) (hereafter "Johnston").

2. Plaintiff's Brief in Support of Motion for Reconsideration, 13.

3. Plaintiff filed Dr. Miller's deposition with the Clerk's Office on April 15, 1975.

with the Clerk's Office the deposition of Dr. Herman P. Miller. Dr. Miller, a distinguished statistician, had submitted data suggesting that there was no rational basis in fact for the legislation passed in 1945 which gave women an advantage in earlier retirement benefits.⁴ No copy of Dr. Miller's deposition was forwarded to my office by either counsel for the plaintiff or the Clerk's Office.

[3]

Thus, appropriately, plaintiff's counsel has filed a petition asking that I reconsider my opinion in view of Dr. Miller's deposition.

Dr. Miller's deposition, and plaintiff's extensive legal argument now based thereon, concern basic perceptions of the status of women in 1945 when the legislation was passed. Were women generally, or at least in the railroad industry, truly on parity with men in terms of employment opportunities? Did they really have equal opportunity for advancement? Was 30 years labor in the railroad industry "harder on women than on men"?⁵ On the basis of the data *then* available, could Congress rationally find that there was a disparity in the treatment of women and/or discrimination against women in the railroad industry? Upon making such finding of disparity or dis-

4. Dr. Miller, in light of his statistical analysis, concluded that: [Women] are healthier. They find it easier to get a job and they can continue to work, their ability to continue to work is probably better than older men in this age group, in the sixty-four-year-age group.

Deposition of Dr. Herbert P. Miller, 38-39.

5. Letter from Kenneth A. Ritchie, Assistant United States Attorney, filed as a supplemental memorandum, to A. Leon Higginbotham, Jr., United States District Judge for the Eastern District of Pennsylvania, filed April 14, 1975, at 3. Mr. Ritchie's letter was an analysis of the testimony of Chairman Latimer before the House Committee on Interstate and Foreign Commerce. See Text, *infra*, at 8.

crimination or greater wear, could Congress deal with such disparities by passage of an act giving women slightly advantageous retirement benefits as are reflected in the amended 1937 Act?

Having pondered these additional questions raised by plaintiff's Petition for Reconsideration, I again conclude that the statute in question is clearly constitutional and hence there is no need for the appointment of a three-judge court to determine its validity.

[4]

II. LEGISLATIVE HISTORY.

Section 228b of the Railroad Retirement Act of 1937, as amended, provided that "women who will have attained the age of sixty and will have completed thirty years of service" shall be eligible for full retirement benefits, but that each man "who will have attained the age of sixty and will have completed thirty years of service" will have his annuity "reduced by $\frac{1}{180}$ for each calendar month that he . . . is under age sixty-five when the annuity begins to accrue."⁶

6. § 228b in pertinent part, reads:

(a) The following-described individuals, if they shall have been employees on or after the enactment date, and shall have completed ten years of service, shall, subject to the conditions set forth in subsection (b)-(d) of this section, be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in section 228a(a) of this title (but with the right to engage in other employment to the extent not prohibited by subsection (d) of this section):

1. Individuals who on or after the enactment date shall be sixty-five years of age or over.

2. Women who will have attained the age of sixty and will have completed thirty years of service.

3. Men who will have attained the age of sixty and will have completed thirty years of service, or individuals who will have attained the age of sixty-two and will have completed less

[5]

In 1973, the Commission on Railroad Retirement, established to study the problems and financial viability of the Railroad Retirement System, expressed the purposes of the Railroad Retirement Act:

The railroad retirement system was created in 1935 as a special benefit system for railroad workers. It is federally-administered but has always been self-supporting from contributions by the workers and the railroads. . . . The system has lacked a clear set of objectives, delineating between the socially-weighted benefits provided under a *social insurance scheme* and those appropriated to a private industry supplementary pension plan. 1973 U. S. Cong. & Adm. News 1649 (emphasis added).

The Railroad Retirement Act of 1937 provided for a system of annuity and not pension benefits. *Railroad Retirement Board v. Bates*, 126 F. 2d 642, (D. C. Cir. 1942). The Act was weighted in favor of complete retirement upon receipt of annuity payments. *United States v. Bush*, 255 F. 2d 791, 794 (3d Cir. 1958).⁷ The annuities under the Act are paid from a fund to which "the employees and the railroads have contributed equally on all salaries of employees earned after December 31, 1936." The fund is

6. (Cont'd.)

than thirty of service, but the annuity of such men or such individuals shall be reduced by $\frac{1}{180}$ for each calendar month that he or she is under age sixty-five when the annuity begins to accrue.

45 U. S. C. § 228b (emphasis added).

7. The conclusion of the Third Circuit is consistent with the testimony of Chairman Latimer before the Committee on Interstate and Foreign Commerce, in which he contrasted the goal of annuity payments under the Act with the practice of some private

▲ . See Text, *infra*, at 6-7.

set up on an actuarial basis. *Scott v. Railroad Retirement Board*, 227 F. 2d 684, 686 (7th Cir. 1955).

[6]

There is an effort to operate the Railroad Retirement benefit system in tandem with the Social Security Act. "Historically, whenever social security benefits have been increased, railroad retirement benefits have also been increased comparably." 1973 U. S. Cong. & Adm. News 1617. Consequently, annuity payments provided for under the Railroad Retirement Act *are not* the equivalent of payments made pursuant to a private pension plan.

The most important part of the legislative history of § 228b is the January 31, 1945 testimony of the then Chairman of the Railroad Retirement Board, Mr. Murray W. Latimer, before the House Committee on Interstate and Foreign Commerce. In the course of his testimony, Mr. Latimer noted that the purpose of "social insurance" such as that established in part by the Act was "that of providing security" through the "promise of fixed incomes." Hearings on H. R. 1362 Before the Committee on Interstate and Foreign Commerce, 79th Cong., 1st Sess., pt. 1, at 134 (1945) (hereafter "Hearings"). Latimer rejected the concept of using "the retirement system as a regulator of the labor market" either through the provision of compulsory retirement at 65 or through allowance of retirement at an early age with full annuity benefits. Hearings, *supra*, at 135-136. Latimer's conclusion was founded, to some degree, on a consideration of "the experience in other retirement systems where annuities were available at an age below that at which workers normally cease to seek employment." That experience indicated that laborers retiring at an arbitrarily pegged early age not only remained in the labor market, but also were in a "preferred position."

[7]

These individuals could "substantially increase their incomes" by "offering to take work at wages slightly under the prevailing rate" because of the security of an "assured income." Hearings, *supra*, at 135-36. After rejecting the notions identified above, Latimer discussed the suggested amendment of the Act's annuity provisions which allowed for the early retirement of women with full annuity benefits. The chairman maintained, as he had earlier in his testimony, that "special provision for women seems to me appropriate." Hearings, *supra*, at 136. The unavoidable inference from Latimer's testimony is that Congress was providing for the earlier retirement of women with full benefits at an age at which female workers "normally cease to seek employment," and not before.

In addition, Mr. Latimer commented on the low representation of women in the railroad industry:

Women have, at least until recent years, been represented only to a minor degree in the railroad industry. Even among qualified workers in the benefit years 1943-44, women constituted slightly less than 4 percent. Hearings, *supra*, at 116.

[8]

The most critical portion of Mr. Latimer's testimony was his comment, as follows, on the suggested amendment to § 228b:

[S]pecial provision for women is appropriate. There is much evidence that, despite the greater longevity of women as compared with men, their efficiency on jobs outside the home tends to become impaired at an earlier age than in the case of men. In its report for 1943, the Social Security Board stated that there was little doubt that the proportion of

women unable to engage in regular employment at age 60 is larger than the proportion of men at age 65.' Most pension systems of private employers, having any substantial number of women workers, make provision for retiring women at an earlier age than male employees. The Social Security Board has recommended that income benefits for women under the old-age and survivors' insurance system begin at 60. The provision in H. R. 1362 does not go as far as the recommendation of the Social Security Board; I think it an appropriately cautious step in the right direction. Because it fits, as far as it goes, the peculiar needs of women workers, it can hardly be said to involve any element of discrimination in favor of women over men. Hearings, *supra*, at 50.

Subsequent to Chairman Latimer's testimony, Congress enacted the statute now in issue.

[9]

III. EQUAL PROTECTION CLAUSE—VARYING STANDARDS OF REVIEW.

There has been a gradual evolution in the equal protection standards used by the Supreme Court in evaluating challenged state and federal legislation.⁸ Commentators

8. The Court noted in *Weinberger v. Weisenfeld*, 420 U. S. 636, 95 S. Ct. 1225, 1228 n. 2 (1975), that:

[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process' [citations omitted]. This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.

In this action, § 228b of the Railroad Retirement Act is alleged to violate the due process clause of the Fifth Amendment. Since the standards of review are identical either under the Due Process or

have dubbed the various doctrinal postures assumed by the Justices in their constitutional analyses the "old," "new," and "newer" equal protection tests.⁹

Under the "old" equal protection schema, a classification adopted by a state or national legislature had to be "reasonable, not arbitrary, and must rest upon some ground of *difference* having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co. v. Virginia*, 253 U. S. 412, 415 (1920) (emphasis added). Despite its initial holding that all similarly situated persons would receive equal treatment, the Supreme Court found it necessary to veer from a course

[10]

consistent with its announced doctrine in order to avoid placing legislators in a "constitutional straitjacket." Consequently, the Justices found that a statute satisfied the requirements of the Equal Protection Clause once the mere rationality of its classifications was demonstrated. Any legislative line-drawing, not involving race or touching upon interests like voting or travel, was valid under the "old" test so long as the distinctions were rationally supportable. The constitutionality of a legislative act was not dependent upon a detailed statutory history revealing the purpose for the classifications embodied therein. In fact, a statute could withstand an equal protection attack

8. (Cont'd.)

Equal Protection Clauses of the Fifth and Fourteenth Amendments respectively, then any comments on the development of equal protection doctrine are pertinent here.

9. See Gunther, *The Supreme Court 1971 Term—In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972) (hereinafter "Gunther"); cf. Note, *Developments In the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969) (hereinafter, "Developments").

even if the statutory history was silent with respect to the legislative purpose. The result of the Court's attempt to balance the need for equal treatment of persons similarly situated against the necessity for legislative classifications was that a statute was invalidated for abridging the Equal Protection Clause only if "no ground" could be "conceived" to justify the distinctions embodied therein. *McDonald v. Board of Election Commissioners*, 394 U. S. 802, 809 (1969).

[11]

This extreme deference to legislative judgments, upon a showing of the rationality of the classifications, prompted one constitutional scholar to remark that legislation was accorded only "minimal scrutiny in theory and virtually none in fact."¹⁰

Some legislative classifications, namely those considered invidious, prompted detailed scrutiny by the Court before it upheld or struck down a statute on equal protection grounds. The "new" equal protection analysis was called for either when the legislature made a distinction among persons on the basis of race or alienage, or when an interest of sufficient importance, *e.g.*, voting or travel, was impeded by a legislature differentiation. The reasonableness of a statutory measure and some laudable objective for its enactment were insufficient, without more, to secure the statute against constitutional assault. The classification would stand only if the proponent interest that could not be achieved in other ways.¹¹ The legislature

10. Gunther, *supra* note 9, at 8.

11. See *Loving v. Virginia*, 388 U. S. 1, 11, 87 S. Ct. 1817, 1823 (1967) where the Court held:

At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny' . . . and, if they are ever to be upheld, they must be shown to be *necessary* to the ac-

was relegated to a much narrower battleground in its attack on social and/or economic ills. Not only was the court unwilling to *imagine* rationales for the classification in issue, but also the classification must have been a *necessary* means of achieving the

[12]

purpose the statute was designed to implement. Consequently, the statute must have neither imposed burdens nor bestowed benefits on more individuals than were essential to accomplish the purpose of the act. At the same time, the classifications could not result in the exclusion of individuals similarly situated who should have been benefited or burdened depending on the over-all design of the challenged statute. Unlike the analysis sketched in *Jefferson v. Hackney*, 406 U. S. 535, 92 S. Ct. 1724 (1972), where the legislature was entitled to partially address a particular problem,¹² here the legislature could fall neither wide nor short of the designated purpose and hope to pass strict constitutional muster. Professor Gunther main-

11. (Cont'd.)

complishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. (emphasis added)

12. In *Jefferson*, the Supreme Court considered the constitutionality of Texas' welfare computation formulas. The State constitution set a ceiling on state-financed welfare grants which fell short of the level of federally-computed relief available through categorical assistance programs. In order to bridge the gap, the State computed the recipient's level of need under the federal formulas and then reduced that figure by a given percentage. While the aged, the blind and the disabled received from ninety-five to one-hundred percent of the relief computed under the federal formula, dependent children received only seventy-five percent of their federal entitlement. A majority of the Justices found that the State could partially assist some individuals qualifying for categorical assistance while wholly meeting the federally-determined needs of others, without infringing the requirements of the Constitution.

tained that the "new" equal protection mode of evaluation resulted in judicial scrutiny which was "'strict' in theory and fatal in fact."¹³

[13]

The polarity of the "old" and "new" equal protection tests was disturbed when the "newer" constitutional theory was formulated in *Reed v. Reed*, 404 U. S. 71, 92 S. Ct. 251 (1971), which will be discussed later in this opinion, and in *Eisenstadt v. Baird*, 405 U. S. 438, 92 S. Ct. 1029 (1972). *Eisenstadt* involved an equal protection challenge to a conviction under a Massachusetts statute which prohibited the distribution of contraceptives to unmarried individuals by persons authorized to distribute drugs. While the Court recognized that the object of such legislation, consistent with the Equal Protection Clause, could have been the deterrence of premarital sex, it rejected that proposition as one that could not "reasonably be regarded as the purpose of the Massachusetts law." *Eisenstadt*, *supra*, 92 S. Ct. at 1035. Rather than accepting *any imagined rational purpose* for a legislative classification, the Court conducted an inquiry into the *actual purposes* of the legislation. Unlike the "new" equal protection test, here there was no requirement that the classification selected be the least drastic alternative for achieving a legislative purpose. No compelling interest was required for upholding the statute as constitutional. However, under the "newer" equal protection format, the Court required that the legislative purpose "have substantial basis in actuality, not merely in conjecture."¹⁴

13. Gunther, *supra* note 9, at 8.

14. Gunther, *supra* note 9, at 21.

The genesis of the "newer" equal protection analysis was foreshadowed in a note discussing the preferred standard of review for scrutinizing "benign" racial classifications. See definition of the

[14]

The "newer" equal protection doctrine may, in fact, constitute nothing more than an infusion of new resolve into the original or "old" equal protection test defined in *F. S. Royster Guano Co.*¹⁵ Whether the "newer" equal protection doctrine imports that the Supreme Court has come full circle in its constitutional analysis or not, it is important to recognize that the three standards sketched above are being applied concurrently. The "newer" equal protection doctrine does not

[15]

spell the death either of strict judicial scrutiny or of mere rationality.¹⁶

14. (Cont'd.)

term "benign racial classifications," Text, *infra*, at 41 n. 32. The author of the note postulated that the courts had to determine the actual purpose of the allegedly benign statute and, for this purpose, courts should use the following standard of review:

Unlike a court applying the classic permissive standard of review, a court here would not be concerned with finding *any conceivable purpose*, but would be concerned with determining, from among the class of conceivable purposes, [for the legislative classification], *whether the predominant purpose is non-invidious*.

Developments, *supra* note 9, at 1115 (emphasis added).

15. Professor Gunther maintains that the "newer" equal protection analysis:

would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends. The equal protection requirement that legislative classifications must have a substantial relationship to legislative purposes is, after all, essentially a more specific formulation of that general principle."

Gunther, *supra* note 9, at 20. The "newer" equal protection analysis, in effect, raises the level of inquiry from "virtual abdication to genuine judicial inquiry." Gunther, *supra* note 9, at 24.

16. "That expanded reasonable means inquiry [newer equal protection evaluation] would not mean the end of strict

One question for decision in this case is which of the above standards is applicable in my evaluation of § 228b of the Railroad Retirement Act. A review of the Supreme Court's recent decisions in cases where classifications were allegedly based on sex will aid in arriving at an answer to the above question.

IV. THE CHANGE IN JUDICIAL ATTITUDES TOWARD WOMEN.

Just as constitutional doctrines develop over time, so too, societal perceptions are altered and reformulated over a span of years. Views of societal structure are reflected in our judicial decisions, so that any consideration of the Supreme Court's recent decisions regarding alleged sex discrimination must begin with a consideration of the Court's changing attitude toward women. The United States Supreme Court in decades past has sanctioned patent deprivations of opportunity for women. Thus Myra Bradwell was denied admission to the bar of the State of Illinois in 1872 solely because she was a woman.^{16a} Except for Chief Justice Chase, all of the Justices felt that

[16]

the denial of her admission to the bar did not violate her federal constitutional rights. Justice Bradley felt compelled to add a concurring opinion:

On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and

16. (Cont'd.)

scrutiny. In the context of fundamental interests or suspect classifications, the Court would continue to demand that the means be more than reasonable—e.g., that they be 'necessary,' or the 'least restrictive' ones."

Gunther, *supra* note 9, at 24.

16a. A refined reading of the majority opinion might suggest that if Myra Bradwell had not been married, the Illinois court would not have precluded her admission to the bar of that state.

woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most states. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

Bradwell v. State of Illinois, 83 U. S. 442, 446 (1873).

However, the Court,¹⁷ by 1973, had adopted a different

17. Although only four Justices, in the plurality decision in *Frontiero*, held that sex-based classifications were "inherently suspect," Justice Stewart, in his concurring opinion, relied on *Reed v. Reed*, *supra*, to find that the classification under consideration in

[17]

stance toward the female population of the United States. In *Frontiero v. Richardson*, 411 U. S. 677, 93 S. Ct. 1764 (1973), four Justices noted that Thomas Jefferson believed that "women should be neither seen nor heard in society's decisionmaking councils."¹⁸ In response to Jefferson's admonition, the Court stated that "... our Nation has had a long and unfortunate history of sex discrimination" which has been "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." 93 S. Ct. at 1769. As late as 1974, in *Kahn v. Shevin*, 416 U.S. 351, 353, 94 S. Ct. 1734 (1974), the Supreme Court recognized without equivocation:

Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs.

A good summation of the change in national attitudes on sex discrimination was written by Professor Julius Getman. After noting the inclusion of sex discrimination among those acts prohibited by Title VII of the Civil Rights Act of 1964, the proliferation of comparable state legislation, and the passage of the Equal Rights Amendment by the House and the Senate, Professor Getman concluded that:

[D]istinctions based on the concept of separate spheres [for males and females] has become much less consistent with the general fabric of our legal system. Getman, *supra* note 1, at 164 (footnote omitted).

17. (Cont'd.)

Frontiero worked an "invidious discrimination." *Reed* also demonstrated a new judicial attitude toward women. See *infra*, at 20 n. 20. Thus, the statement in the Text above applies to a majority of the Justices on the Supreme Court.

18. *Frontiero*, *supra*, 93 S. Ct. at 1769 n. 13.

[18]

V. SEX-BASED CLASSIFICATIONS UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES.

Each of the equal protection tests articulated earlier in this opinion has been applied in the sex discrimination area. As of late, the Court, in a majority of cases evaluating alleged sex-based classifications, has required that the statutory distinctions bear more than a mere rational relationship to the purpose of the legislation.¹⁹

An abandonment of the "old" equal protection test in the area of sex-based classifications was first indicated in *Reed v. Reed*, *supra*. There the Supreme Court considered two sections of the Idaho code providing for the mandatory appointment of male over female applicants for the position of administrator of an intestate estate. The females disfavored by the Idaho legislature were equally entitled to receive the appointment, standing in the same relationship

[19]

to the decedent as their preferred male counterparts. The Supreme Court found that the Idaho legislature had di-

19. Justice Brennan, in his dissenting opinion in *Geduldig v. Aiello*, *supra*, maintained that the majority had returned to the "traditional" equal protection analysis in that action. In any event, the majority in *Geduldig* refused to evaluate the disability insurance program in light of its decisions in *Reed v. Reed* and *Frontiero v. Richardson*, but rather held that no sex-based classification was included within the statute and, that the statute merely differentiated between pregnant persons and non-pregnant persons, the latter category including both males and females. The majority found that the exclusion of normal pregnancies from the list of disability entitlements was justified by the State's goal to provide the maximum coverage available for persons at even the lowest income levels without increasing deductions from potential beneficiaries' salaries. For a discussion of the facts in *Geduldig*, see Text, *infra*, at 27.

vided members of the same relationship class into subclasses on the basis of sex, and that the latter categorization was subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. The Court, in a unanimous opinion, concluded that the "arbitrary preference established in favor of males in the Idaho Code" was invalid. Chief Justice Burger, in his opinion for the Court, acknowledged that there was a rational basis for the statute in question:

Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is *not without some legitimacy*. The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, *merely to accomplish the elimination of hearings on the merits*, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; *and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.*

92 S. Ct. at 254 (emphasis added).

At first glance, it may appear that *Reed* applies only the rational relationship test appearing in *F. S. Royster Guano Co.*

[20]

However, upon closer examination it becomes evident that, *despite the showing of a rational basis for the classification,*

the Court concluded that the legislative decision was arbitrary.²⁰

[21]

The Court's requirement that sex-based classifications bear more than a mere rational relationship to the purpose of the statute is further evidenced by an examination of the

20. Professor Gunther concluded that it was difficult to understand the decision in *Reed v. Reed*:

without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis. Clear priority classifications are plainly relevant to the State's interest in reducing administrative disputes. Even if the requirement be that the means bear a 'significant relationship' to the state's purpose, or contribute substantially to its achievement, the test would seem to have been met in *Reed*. Only by importing some special suspicion of sex-related means from the equal protection area can the result be made entirely persuasive. Yet application of new equal protection criteria is precisely what *Reed v. Reed* purported to avoid.

Gunther, *supra* note 2, at 34. (footnotes omitted).

Another view of the change in the Supreme Court's treatment of cases where sex discrimination is alleged is found in an article by Professor Getman. He argues that:

"The decisions in *Reed* and *Stanley* [*Stanley v. Illinois*] demonstrate that the Court can significantly alter the constitutional importance of sexual equality without formally changing the standard of review under the Fourteenth Amendment. The traditional tests under the Fourteenth Amendment have always left considerable discretion to the Court through the technique of defining the statute's purpose. If the purpose is described narrowly in terms of the immediate ends which a statute seeks to achieve, then distinctions which serve peripheral or secondary goals may be held improper. Thus, the statute in *Reed* was described as a way to resolve disputes about administration. Differentiation between the sexes was neither necessary nor directly related to the purpose. It also could have been characterized as seeking to resolve disputes without disturbing inter-family harmony." Getman, *supra*, at 162.

Getman's analysis is analogous to that of Gunther, *i.e.*, that the Court under the "traditional" or "old" equal protection test, validated statutes by defining—"imagining"—a purpose for the statute which may or may not have had support in the legislative history.

Court's decisions in cases where sex-based classifications were challenged under another amendment to the Constitution.²¹

In an opinion by Justice Blackmun, the Court held that the standard articulated in *Reed* was controlling in *Stanton v. Stanton*, 421 U. S. 7, 95 S. Ct. 1373 (1975). In that case a Utah statute establishing differing ages of majority for males and females resulted in the withdrawal of support payments from a female child at age 18, whereas a male child was entitled to receive court-decreed support payments until he reached his

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later age of majority—21 years. The Court refused to decide whether sex should be considered an “inherently suspect” classification subject to “strict” scrutiny under the Equal Protection Clause. Nonetheless, the Court subjected the statute, as one which accorded different treat-

21. A dramatic shift in the Court's sensitivity to sex-based classifications and the resultant change in the applicable standards for evaluation of the same is demonstrated by comparison of the Court's opinions in *Hoyt v. Florida*, 368 U. S. 57 (1961) and *Taylor v. Louisiana*, 419 U. S. 522 (1974).

In *Hoyt v. Florida*, the Court held that a system under which women were automatically excluded from juries unless they volunteered for service did not constitute a denial of due process or equal protection, because there was a “sufficient rational basis” for the exemption. The Court also found that the extension of the exemption to include unmarried females was valid for reasons of administrative convenience. By contrast, in *Taylor*, the Court rejected the administrative convenience argument and found that exclusion of women from jury panels was a violation of a criminal defendant's Sixth Amendment right to a trial by an impartial jury drawn from a fair cross-section of the community. The Court further held that:

The right to a proper jury cannot be overcome on merely rational grounds. There must be weightier reasons if a distinctive class representing 53% of the eligible jurors is for all practical purposes to be excluded from jury service. No such basis has been tendered here. (footnotes omitted)

419 U. S. at 534 (emphasis added).

ment on the basis of sex, to the scrutiny required by *Reed*. The distinction in support obligations on the basis of the child's sex had to bear a “fair and substantial relation” to the object of the majority age statute. The Utah Supreme Court had postulated that the purpose of the majority statute was to provide parental support for male children during their education and training. The Court invalidated the statute on the grounds that “no valid distinction” could be drawn between male and female children in the support payment context. It found that the reasons posed by the Utah Supreme Court for the statutory distinction—that males should have the opportunity to complete their education and training before undertaking their primary responsibility of making a home, and that females mature and marry earlier than males—were insufficient, assuming the truth of the assertions, to sustain the statute against equal protection attack.

The Court invalidated federal legislation in *Weinberger v. Weinsenfeld*, 420 U. S. 636, 95 S. Ct. 1225 (1975), when it reviewed a provision of the Social Security Act under which widows but not widowers were entitled to survivor's benefits based on the earnings of a deceased spouse. Although the opinion made reference to *Frontiero v. Richardson*, *supra*, a plurality

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decision in which sex was defined as a “suspect classification”, there was no reliance on that doctrine in the *Weinberger* decision. Instead, the Court concluded that the denial of benefits to male surviving spouses under the Social Security Act was rooted: (1) in the presumption that males rather than females were primarily responsible for the support of their spouses and children; and (2) in the presumption that females were apt to forego work in order to care for their children whereas men were not. The

Court reached this result after a detailed inquiry into the legislative history in an effort to discern the primary purpose underlying the statute under attack. The government argued that the classification was "reasonably designed to compensate women beneficiaries as a group" for difficulties still incurred in attempting to support themselves and their families. 95 S. Ct. at 1233. The Court rejected that possibility, not as an impermissible legislative goal, but as one belied by a clear legislative history. Finding that the purpose of the statute was to enable "the surviving parent to remain at home to care for a child" the Court held that "the gender-based distinction of § 402(g)" of the Social Security Act was "entirely irrational."²² 95 S. Ct. at 1235.

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The preclusion of survivors' benefits for male spouses under the Social Security Act resulted in a "denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support." 95 S. Ct. at 1232. Furthermore, the provision deprived women of the protection for their families available, solely by virtue of employment, to males.

The Court has also found statutes *constitutional* upon application of the "newer" equal protection test in the sex discrimination area. In *Kahn v. Shevin, supra*, the Court

22. Although it is true, as the majority maintained in *Frontiero*, 95 S. Ct. at 1769, that *Reed* was a "departure from 'traditional' rational-basis analysis with respect to sex-based classifications," *Reed* did not require that the proponent of the statute demonstrate that it was the least drastic alternative to accomplish a valid legislative purpose. This requirement, which signals a "suspect classification" designation, was also not imposed in *Weinberger v. Weisenfeld*. In *Weinberger*, the Court merely concluded that the legislative classification was "irrational" in the same off-hand fashion that it declared that the line-drawing in *Reed* was "arbitrary." 95 S. Ct. at 1769.

considered a Florida property tax statute under which widows were entitled to an exemption of \$500. No such exemption was provided for widowers such as the appellant. After recounting the economic disadvantages suffered by women—*e.g.*, their disproportionate concentration in lower paid jobs, the increase in the median income gap between males and females, and the salary differential between men and women in professional, managerial and technical positions—the Court concluded that the statute bore a "fair and substantial relation to the object of the legislation." 416 U. S. at 355. That object, as viewed by the Florida Supreme Court, was to reduce the "disparity between the economic capabilities of a man and a woman." 416 U. S. at 352.

In *Schlesinger v. Ballard*, 420 U. S. 966, 95 S. Ct. 572 (1975), the Supreme Court held that a statutory scheme, which accorded to women naval officers a thirteen year tenure of commissioned service before mandatory discharge for want of promotion, was valid even though it required the mandatory

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discharge of male officers who were twice passed over for promotion, but who might have less than thirteen years of commissioned service. The Court held that the statute was sustainable because of "the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service." 95 S. Ct. at 577.

One source of confusion in determining the applicable standards for review in the sex discrimination area has been the Court's tendency to treat some pregnancy benefit cases as due process rather than equal protection problems. In *Cleveland Board of Education v. La Fleur*, 414 U. S. 632, 94 S. Ct. 791 (1974) (hereafter "*La Fleur*"), the

Court considered the constitutional validity of the mandatory pregnancy leave-without-pay requirements of two boards of education. The Cleveland School Board, unlike the Virginia board: (1) made no guarantee of reemployment following the birth of the child; and (2) forbade the teacher from returning to work until the beginning of the full semester following the date when her child attained the age of three months. The Court, in an opinion written by Mr. Justice Stewart, held that the mandatory leave provisions of both school boards constituted violations of the Due Process Clause of the Fourteenth Amendment. The leave requirements infringed upon "freedom of personal choice in matters of marriage and family life" without any individual determination of a pregnant woman's inability to continue her work. 94 S. Ct. at 796, 798.

[26]

This same analysis was applied in *Turner v. Department of Employment Security and Board of Review of the Industrial Commission of Utah*, — U. S. —, 96 S. Ct. 249 (1975), a *per curiam* opinion, in which the Supreme Court held that a Utah statute withholding unemployment compensation benefits from women beginning twelve weeks prior to childbirth until the sixth week following childbirth was unconstitutional. The Court found that the *conclusive presumption* that pregnant women, or those having recently gone through childbirth, were unable to work violated the Due Process Clause of the Fourteenth Amendment. The state was required to achieve its legitimate objectives not through the vehicle of conclusive presumptions but rather "through more individualized means when basic human liberties are at stake." 96 S. Ct. at 251.

However, just as in *Reed v. Reed*, the majority in *La Fleur* found that the leave provisions were "arbitrary" and

had "no rational relationship to the valid state interest of preserving continuity of instruction." *La Fleur, supra*, 414 U. S. at 643. At the same time the majority upheld the boards' advance notice requirements as "rational" and perhaps "well . . . necessary to serve the objective of continuity of instruction." *La Fleur, supra*, 414 U. S. at 642.

As Justice Powell pointed out in his concurrence in *La Fleur*, perhaps an equal protection analysis should have been used. The doctrinal overlap is most apparent upon review of several sex discrimination cases decided upon equal protection grounds. In *Frontiero v. Richardson*, the Court confronted a *presumption* that women were completely dependent upon their husbands. This presumption was thought by the government to

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supply sufficient justification for the requirement that servicewomen prove that they supplied more than one-half of the support for their husbands in order to qualify for additional benefits. In *Weinberger v. Weisenfeld*, the Social Security section under attack was based on two presumptions, one of which was "that men are more likely than women to be the primary supporters of their spouses and children." Finally, in *Geduldig v. Aiello*, 417 U. S. 484, 94 S. Ct. 3485 (1974), the Court considered the exclusion of normal pregnancy from the list of disabilities compensable under California's disability insurance program. The Court applied the Equal Protection Clause, rather than the Due Process Clause used in *La Fleur*, and found that California statute was constitutionally valid.

All of the sex-related classifications challenged in the cases cited either in the footnotes or in the body of this opinion involve the same "difficulty"—legislators' propensity to classify individuals according to sex. See Johnston, "Sex Discrimination and the Supreme Court—1971-1974,"

49 N. Y. U. L. Rev. 617, 660-661 (1974), where it is argued that "each of the laws and regulations invalidated in the four cases [*Reed*, *Frontiero*, *La Fleur* and *Stanley v. Illinois*, 405 U. S. 645 (1972)] was an integral part of a vast mosaic of government-imposed sex-role stereotyping"; cf. Comment, "Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination," 75 Colum. L. Rev. 441 (1975).

It is apparent from examining these cases that there is little, if any, distinction between the due process and equal protection standards variously applied by the Court in sex discrimination cases.

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In *Frontiero v. Richardson*, *supra*, four of the Justices, in a plurality opinion, reached the zenith in their scrutiny of sex-based classifications and denominated such as "inherently suspect" and "subject to close judicial scrutiny" in accordance with the "new" equal protection requirements. The rationale for placing a specific legislative judgment in a suspect category is that the characteristic is an immutable factor of birth which frequently bears no relationship to an individual's ability to perform in a given situation.²³

In *Frontiero*, the Court considered the challenge that servicewomen were accorded less favorable treatment than servicemen. The latter could automatically receive increased housing and medical benefits for their spouses, while the former could receive such benefits only if it were shown that one-half of the husband's support had been provided by the servicewoman. Justices Brennan, Douglas, White and Marshall disagreed with the district court's conclusion that the distinction between male and female

23. Developments, *supra* note 9, at 1124-27.

service personnel was justified on the basis of the presumed role of the husband as the "breadwinner" and the wife as "dependent" partner. These same Justices, in footnote 22, carved out an implied exception for sex-based classifications which were "designed to rectify the effects of past discrimination against women." *Frontiero*, *supra*, 93 S. Ct. at 1771 n. 22. Justice Brennan suggested that the statutes in issue in *Frontiero* "seize[d] upon a group—women—who have

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historically suffered discrimination, and rely on the effects of this past discrimination as a justification for heaping on additional economic disadvantages." *Id.* The Supreme Court in *Kahn v. Shevin*, *supra*, *Stanton v. Stanton*, *supra*, *Weinberger v. Weisenfeld*, *supra*, and *Schlesinger v. Ballard*, *supra*, refused to or refrained from denominating sex-based classifications as "inherently suspect." Thus, given the current doctrinal posture of the Supreme Court, I do not view the "close judicial scrutiny" standard as appropriate for use in determining the constitutionality of § 228b.

VI. APPLICATION OF THE EQUAL PROTECTION CLAUSE TO SECTION 228b

The plaintiff in this case would liken § 228b of the Railroad Retirement Act to the statutes involved in *Reed*, *Stanton*, and *Weinberger* by asserting that the statute in this case, just as in those cases reviewed above, was premised on assumptions about the relative sex-roles of males and females in American society.

A consideration of the legislative history of § 228b demonstrates the inapplicability of the holdings in those three cases. Under the "newer" equal protection test applied in *Reed*, the Court conducted an in depth inquiry

into the challenged statute's legislative history in order to ascertain its actual purpose. That same standard of review was applied in *Stanton*. However, in *Stanton* the Justices were faced with a state statute for which there was "little or no legislative

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history."²⁵ Furthermore, the Utah Supreme Court had interpreted the statute under review in *Stanton* as one based on "old notions" of "man's primary responsibility to provide a home and its essentials," the male's need for a "good education and/or training" to fulfill that role, and the need for parental support during that apprentice period. In contrast, females were perceived as maturing more quickly, as candidates for an earlier marriage, and thus, not in need of support payments. 95 S. Ct. at 1375-76.

Unlike the Court in *Stanton*, I have the advantage of a developed legislative history to assist in my determination whether § 228b is consistent with the Equal Protection clause. The legislative history does not rely on "old notions" about the role of women in support of their differential treatment under the legislative act. Instead, through the testimony of Chairman Latimer, the legislative history discloses that the statute was premised, in part, on the greater proportion of women unable to continue to work at age 60 as compared with men unable to continue to work at age 65. Furthermore, Congress explicitly considered the possibility that such legislation might discriminate in favor of women over men. Chairman Latimer, in his testimony, had raised and rejected such a notion because women had "peculiar needs," Hearings, *supra*, at 50,

25. *Stanton*, *supra*, 95 S. Ct. at 1375 n. **.

and thus they were not "similarly situated." The legislative history also discloses that the retirement age for women was not fixed below that at which women felt it necessary to withdraw from the labor market. See Text, *supra*, at 6-7.

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Rather than promoting the role of women as "homemaker" and their exit from the job market, the Railroad Unemployment Insurance Act, amended by the same bill which amended the statute in issue in this case, provided maternity benefits for female employees before and after childbirth.²⁶ The rationale for provision of maternity benefits was articulated

26. The provision in question, amending Sections 303, 304 and 305 of the Railroad Unemployment Insurance Act, provided:

Section 303. The first subsection 1(K) is amended by inserting . . . (2) a 'day of sickness' with respect to any employee, means a calendar day on which because of any physical, mental, psychological, or nervous injury, illness, sickness, or disease he is not able to work or which is included in a maternity period, and with respect to which (i) no remuneration is payable or accrues to him, (ii) in accordance with such regulations as the Board may prescribe, a statement of sickness is filed within such reasonable period, not in excess of ten days, as the Board may prescribe:

Section 304.

(1-2) The term 'maternity period' means the period beginning fifty-seven days prior to the date stated by the doctor of a female employee to be the expected date of the birth of the employee's child and ending with the one hundred and fifteenth day after it begins [sic] or with the thirty-first day after the day of the birth of the child, whichever is later.

Section 305.

The amount of benefits payable for the first fourteen days in each maternity period after the birth of the child, shall be one and one-half times the amount otherwise payable under this subsection. Benefits shall not be paid for more than eighty-four days of sickness in a maternity period prior to the birth of the child. Qualifications for and rate of benefits

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again by Chairman Latimer:

"It is decidedly against the national interest for expectant mothers either to engage in employment practically up to the time of childbirth *or to return quickly* to employment after childbirth. Provision for income which will enable expectant mothers to safeguard the health of their children both before and after birth, is of the utmost importance. H. R. 1362 proposes to provide incomes both to workers who become sick and to female employees who are expectant mothers or who have just given birth to children." Hearings, *supra*, at 77.

The Railroad Unemployment Insurance Act provided for benefits during a limited term, from 57 days prior to the child's expected date of birth to the 115th day after benefits commenced or until the 31st day after the birth of the child, whichever was later. The only possible inference from the discontinuation of benefits after a given term was that the female employee, although not to return to work "quickly", was expected to resume her job at some point in time.

26. (Cont'd.)

for days of sickness in a maternity period shall not be affected by the expiration of the benefit year in which the maternity period will have begun unless in such benefit year the employee will not have been a qualified employee.

In computing benefits to be paid, days of unemployment shall not be combined with days of sickness in the same registration period. Hearings, *supra*, at 13-14 (emphasis added).

In light of the Court's holding in *La Fleur*, the establishment of a fixed time at which pregnant women had to cease work in order to qualify for maternity benefits, was a violation of the Due Process Clause. However, it is important to note, that the statute, enacted prior to the change in the Court's attitude toward women, compelled females desirous of maternity benefits to cease employment only at the end of their seventh month of pregnancy.

It is evident from a review of the relevant legislative history that § 228b is unlike the statute invalidated in *Stanton*. Congress did not prescribe or suggest roles for those women who felt the need to retire early from the railroad industry. The legislators relied on reported facts descriptive of the

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then employment pattern of women. The statute was not a statement that women as a group always need special treatment. When the employment situation changed, then Congress altered the law to equalize the treatment of males and females in the railroad industry.²⁷

Plaintiff rightly contends that the Equal Protection Clause as interpreted in *Reed*, prohibits "dissimilar treatment" of males and females who are "similarly situated." *Reed*, as well as *Frontiero*, also invalidates gender-based classifications founded solely on administrative convenience. *Reed*, *supra*, 404 U. S. at 76-77, 92 S. Ct. at 254; accord, *Frontiero*, *supra*, 411 U. S. at 690-91, 93 S. Ct. at 1772. However, Chief Justice Burger also explicitly stated in *Reed* that it has been "consistently recognized that the Fourteenth Amendment [Fifth Amendment] does not deny to States [federal government] the power to treat different classes of persons in different ways." *Reed*, *supra*, 92 S. Ct. at 253 (emphasis added).

Contrary to the situation which obtained in *Reed*, here the legislative history reveals that men and women in the railroad industry were dissimilarly situated in the following respects. Women were a strikingly small proportion of railroad employees. Significantly, in 1970,

27. The Railroad Retirement Act was amended by Public Law 93-69, 87 Stat. 162, to eliminate the compensation differential between male and female annuitants whose retirement benefits accrued after July 1, 1974.

women constituted a smaller percentage of the total work force than they had in 1945. Furthermore, the data demonstrated that the railroad industry had been no oasis in that desert of higher-paying jobs for women. During the year when Chairman Latimer testified, the

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data indicated that women were less than two tenths of one percent of the executives, officials and staff assistants, less than three percent of the professional and sub-professional assistants, and approximately two percent of the supervisors or clerks, even though they constituted approximately eight percent of the total work force. As recently as 1970, women were less than one and one-half percent of the executives, officials and staff assistants, and less than four percent of the supervisors and professionals.^{27a} In addition, there was a fifteen to twenty percent wage differential between male and female employees in the railroad industry. See Plaintiff's Brief in Support of its Motion for Reconsideration, at 8.

Calculation of annuity payments has been based on the average monthly compensation of a railroad employee. The average monthly compensation for railroad employees who subsequently became annuitants was higher for male workers in every year for which such statistics were kept by the Railroad Retirement Board. Defendants' Supplemental Memorandum, at Appendix A.

Congress also considered statistical evidence on the status of women in the work force in the United States in making its decision to adopt the amendment to section 228b. The testimony of Chairman Latimer revealed that the proportion of women unable to continue to work at age 60 was greater than the proportion of men unable to

27a. Defendants Supplemental Memorandum, at Appendix C.

continue to work at age 65. Strikingly, as late as 1965, the Social Security Board reported that "there were over two and one-half as many male workers

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age 60-64 as there were females age 60-64." ²⁸ *Gruenwald v. Gardner*, 390 F. 2d 591, 592 n. 1. (2d Cir. 1968). To refute the defendant's contention that men and women were not similarly situated, either in the railroad industry or in the total work force, plaintiff relies predominantly on statistics from an era 22 years after Chairman Latimer had testified and Congress had passed the statute in issue.

Plaintiff's expert's testimony is no more credible than Chairman Latimer's and, in most respects, it is far less persuasive. First, the information presented by the plaintiff on the comparative life expectancies of males and females for the years 1930 through 1970 is irrelevant for two reasons: (1) it is evident from Mr. Latimer's statement that Congress felt that special treatment of female employees was warranted despite the fact that there was evidence of "greater longevity of women as compared with men"; ²⁹ and (2) what is at issue in the instant suit is the work, rather than life expectancy of males as compared with females for the years 1947 through 1974.

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Furthermore, Dr. Miller appears to have conflicting notions of what constitutes a statistically significant difference. At one point in his deposition, Dr. Miller commented on certain percentage figures collected by the Bureau of Census on males and females reporting ill health as their reason

28. Chairman Latimer based a portion of his testimony with respect to women's inability to continue to work until age 65 on Social Security Board data.

29. See Text, *supra*, at 8.

for not seeking employment and/or working. When asked if the figures for 1964 through 1974 in that survey were comparable, Dr. Miller responded: "Yes, they are. They don't differ by more than a percentage point. You would draw exactly the same conclusion if you looked at any of the years." Deposition of Dr. Herbert P. Miller, 21. From Dr. Miller's testimony in this instance, I infer that he does not regard a one percentage point difference as statistically significant. However, in concluding that the unemployment rate for women aged sixty to sixty-four years was lower than that for men in the same age group, Dr. Miller used data from 1962 through 1974. That data revealed that in over ten of those twelve years, the male unemployment rate was greater than that of females *by no more than one-half to one percentage point*. Deposition of Dr. Herbert P. Miller, 18. I am unable to see how Dr. Miller could find that a one percent statistical difference was so significant in the unemployment study when such a difference was insignificant in the Bureau of Census health study.

Even if I were to accept Dr. Miller's evidence at face value, it fails to negate both the disparity in wages between male and female railroad employees and the underrepresentation of women

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in executive, official and staff positions. Perhaps Dr. Miller would not have voted for the legislation, but I cannot find that Congress committed a constitutional error when rejecting Dr. Miller's view of parity between men and women in the railroad industry. Fortunately for women today, the disparity is not as great as it was in 1945, but to assume that the millenium has been reached requires both naivete and obliviousness to data.

Not only is the analysis in *Reed* inapplicable in this case, but also *Weinberger v. Weisenfeld* presents a wholly-different situation from that which obtains here. The Court in *Weinberger* specifically found, upon examination of the legislative scheme and history of § 402g of the Social Security Act, that the asserted purpose *could not have been a goal* of that statute. In fact, the legislative history revealed a clearly demarcated purpose—to provide children with one parent the opportunity to have that parent's personal attention. *Weinberger, supra*, 95 S. Ct. at 1233. As in *Weinberger*, the defendant contends that the statute herein attempts to rectify the effects of past discrimination rather than compound discrimination based on sex. Congress is said to have intended to supplement the income of female railroad employees, all but 1% of whom were concentrated in the lower paying jobs in the railroad industry. The evidence introduced by the defendant reveals a disparity in income for male and female railroad employees. Smaller contributions were made by and on behalf of lower-salaried individuals to the retirement fund. Women should find little solace in Dr. Miller's conclusion that the gap in income between women and males in the railroad industry was not as large as the gap in some other industries. Congress could have decided that special

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provision for female annuitants was necessary in order to supplement their retirement income. The legislators' adoption of the Act for this compensatory purpose is not belied by "any inquiry into the actual purposes underlying . . . [the] statutory scheme." *Weinberger, supra*, 95 S. Ct. at 1233.

Congress' purpose in enacting § 228b was to decrease "the disparity between the economic capabilities of a man

and a woman" employed in the railroad industry. See *Kahn v. Shevin*, *supra*. Here, just as in *Schlesinger v. Ballard*, the differential treatment of male and female annuitants was based on the demonstrable fact that men and women were not similarly situated with respect to opportunities in the railroad industry.

Congress recognized the impact of the recent improvements and thus in 1973 it eliminated the annuity difference between men and women. This recent legislative change is similar to that which the Navy had proposed to Congress in *Schlesinger v. Ballard*, that female Naval lieutenants should in the future be governed by the same standards as male lieutenants. And the Supreme Court's response to the Navy's proposals in *Schlesinger* is similarly applicable to the instant case:

These developments no more than reinforce the view that it is for Congress, and not for the courts, to decide when the policy goals sought to be served by § 6401 are no longer necessary to the Navy's officer promotion and attrition programs.

Schlesinger, *supra*, 95 S. Ct. at 579 n. 13.

Plaintiff contends that the special annuity provision could not have been drafted with the compensatory purpose suggested by the defendant in mind, for the statute bestows special benefit "only to that small number of women (6,300 in 1972), who retired between the ages of 60 and 64 after working 30 years in the railroad industry." Plaintiff's Brief

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The contention here is the exact opposite of the argument made by some dissenting Justices in *Kahn v. Shevin*. In *Kahn*, Justices Brennan and Marshall complained that the property tax statute could have been drafted differ-

ently so that "its purpose would have been accomplished more precisely." Justice Douglas' answer to Justices Brennan and Marshall is equally instructive in this case: "But the issue, of course, is not whether the statute could have been drafted more wisely, but whether the lines chosen by the . . . Legislature are within constitutional limitations." *Kahn v. Shevin*, *supra*, 416 U. S. at 356 n. 10.

The "newer" equal protection standard does not require the choice of any one method of advancing a compensatory purpose.³⁰ A recent case, *Jefferson v. Hackney*, *supra*, outlines the breadth of legislative choices, once the classification has been shown to be "rational and not invidious":

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This court emphasized only recently, in *Dandridge v. Williams* [citation omitted] that in 'the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' A legislature may address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there, neglecting the others.' *Williamson v. Lee Optical Co.* [citation omitted]. So long as its judgments are *rational, and not invidious*, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straight-jacket. The very complexity of the problems suggests

30. Professor Gunther counsels that:

"the strengthened 'rationality' scrutiny [of the newer equal protection test] would curtail the state's choice of means far less severely than the new equal protection approach. The Warren Court's strict scrutiny repeatedly asked whether the means were 'necessary' and whether 'less drastic means' were available to achieve the statutory purpose. . . . The more modest interventionism, by contrast, would permit the state to select any means that substantially furthered the the legislative purpose." Gunther, *supra* note 9, at 20.

that there will be more than one constitutionally permissible method of solving them (emphasis added).

Jefferson v. Hackney, *supra*, 92 S. Ct. at 1731.³¹

Often when an objection is raised about the precision with which ameliorative legislation is drafted, the protesting party is hiding the real basis for the objection, namely, the desire that no legislation should be approved which affirmatively compensates for past inequalities. While I am cognizant of developing trends in constitutional theory, I cannot find this statute invalid for Congress' failure to take more than "one step at a time."

Contrary to the position advanced by the government in *Frontiero*, in this case there is more than the mere allegation of administrative convenience as the justification for the statute in question. Four of the Justices in *Frontiero* also recognized the distinction between legislation which "heaped additional disadvantages" upon persons burdened with disabilities previously imposed by society

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and acts of Congress which were efforts at eradicating society's past errors. Justices Brennan, Marshall, White, and Douglas could rationally draw such a distinction because a benign,³² albeit sex-based, classification is not

31. Although the standard of rationality used in *Jefferson* was more akin to the "traditional" equal protection test than the "newer" test, the range of legislative options, once the classification has been proved valid under more rigorous standards, remains the same.

32. A benign classification has been defined in the racial context as "programs which attempt to redress the effects of past racial discrimination." *Developments*, *supra* note 9, at 1104.

In their comprehensive article on the impact of the ratification of the Equal Rights Amendment, Brown, Emerson, Falk, and Freedman define compensatory aid as:

special assistance to members of one race in order to give them the education, training or other help that will put them more

prone to the dangers created by those distinctions which have historically resulted in the deprivation of opportunities for women. Section 228b did not impose any "status of inferiority";³³ it was not premised on any presumption about the role of women. No assumption was made that

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women were permanently inferior to males and thus would always require special treatment. See Text, *supra*, at 23.

There are a series of cases pertaining to portions of the Social Security Act which, if not perceptively under-

32. (Cont'd.)

quickly on a level of equality with the other race. (emphasis added)

Brown, *supra* note 1, at 903. § 228b would be classified as compensatory aid. While we are not applying the standards of strict judicial scrutiny, we note that the authors of the above article conclude that a court, in applying strict judicial scrutiny, would find compensatory aid constitutional at least in the area of race relations:

"where the courts determine that the purpose of the differentiation is to benefit members of the minority race, rather than to impose a status of inferiority, they are likely to find 'compelling reasons' for the special treatment. *Id.* at 904 (emphasis added).

33. Professor John Ely suggests that special scrutiny is not appropriate when benign classifications are involved. He also proposes that "it is not 'suspect' in a constitutional sense for a majority, any majority to discriminate against itself." In the racial context, Professor Ely maintains that:

"'special scrutiny' is not appropriate when White people have decided to favor Black people at the expense of White people." Ely, "The Constitutionality of Reverse Racial Discrimination," 41 U. Chi. L. Rev. 723, 727 (1974).

Using Ely's schema, women have certainly not been the legislatively dominant group. The Supreme Court stated in *Frontiero*: "It is true, of course, that when viewed in abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. . . . Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And . . . this underrepresentation is present throughout all levels of our State and Federal Government." *Frontiero*, *supra*, 93 S. Ct. at 1770 n. 17.

stood, would seem repugnant to the holding in this case. The leading case in this area is *Jablon v. Secretary of Health, Education and Welfare*, 399 F. Supp. 118 (D. Md.) appeal docketed sub nom. *Matthews v. Jablon*, 44 U. S. L. W. 3364 (U. S. Nov. 19, 1975). In *Jablon* a three-judge court found that § 402(c)(1)(c) of the Social Security Act violated the Due Process Clause of the Fifth Amendment. That section of the Social Security Act provided derivative "husband's benefits" for males who proved that they received more than one-half of their support from their wives during certain periods. Women did not have to prove dependency in order to receive these derivative benefits. The court in *Jablon* rejected the government's claim that § 402(c) was remedial legislation designed to provide economic compensation

[43]

for women for past discrimination. 399 F. Supp. at 129-30. It is important to note that in the paragraph subsequent to the rejection of the government's remedial claim, the court found that the statute had an "indirect" "adverse impact" on women. The supposedly prophylactic statute operated to the disadvantage of the working wife by diminishing the family protection generated by her earnings, when compared with the family protection created by the working husband's earnings. The statute actually perpetuated the same vice it was designed to rectify—past economic discrimination against female wage earners. See *Moss v. Secretary of Health, Education and Welfare*, 44 U. S. L. W. 2361 (M. D. Fla. Jan. 15, 1976). Such an "indirect adverse impact" on women is not created by § 228b of the Railroad Retirement Act.

I regard the court's finding that § 402(c) of the Social Security Act had an "indirect" "adverse impact" on women

as a crucial factor in its rejection of a remedial purpose for that statute. Given that § 228b does not have such an "adverse impact" on women, the court's decision in *Jablon* does not mandate a rejection of the remedial purpose served by § 228b in this case.

VII. APPLICATION OF TITLE VII TO SECTION 228b

The plaintiff contends that § 228b was "impliedly repealed" by the Civil Rights Act of 1964³⁴ and relies on

34. Title VII of the Civil Rights Act of 1964 provides, in pertinent part:

"(a) It shall be an unlawful employment practice for an employer—

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 U. S. C. § 2000e-2(a).

The Equal Employment Opportunity Commission in April 5, 1972 issued its revised "Guidelines on Discrimination Because of Sex", which provide in relevant part:

"Fringe Benefits:

(a) 'Fringe benefits,' as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

(f) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex.

29 C. F. R. § 1604.9 (1972).

[44]

Rosen v. Public Service & Gas Co., 477 F. 2d 90 (3d Cir. 1973), and *Bartmess v. Drewrys U. S. A., Inc.*, 444 F. 2d 1186 (7th Cir. 1971) in support of this proposition.

Plaintiff's contention is without merit for the following reasons. First, the subject matter in both *Rosen* and *Bartmess* was the validity of private retirement and/or pension plans under Title VII. However, the Railroad Retirement benefit system is not the equivalent of a private pension plan. See Text, *supra*, at 4-5. Furthermore, in neither case was there any allegation that a primary purpose of the pension plan was to compensate for previous wage discrimination.

Moreover, plaintiff's contention is premised on an alleged inherent conflict between Title VII and § 228b of the Act. After careful consideration of this claim, I fail to find any such inconsistency between these two legislative provisions. Under Title VII, Congress explicitly empowered the courts, upon a finding of unlawful employment practices, to "enjoin . . . and order such affirmative action as may be appropriate." 42 U. S. C. § 2000e-5(g). The purpose of the quoted portion of Title VII is to allow the court to make the victims of past discrimination

[45]

whole by restoring them "to their rightful economic status absent the effects of the unlawful discrimination." See *Robinson v. Lorillard Corp.*, 444 F. 2d 791, 802 (4th Cir.), *cert. dismissed*, 404 U. S. 1006, 92 S. Ct. 573 (1971).³⁵ The statute in this case has exactly the same thrust as the quoted portion of Title VII—to place women in their rightful economic place through affirmative action.

35. Although *Robinson v. Lorillard* specifically concerned the court's power to award back pay, a court is not limited to that form of relief. The statute provides for such "affirmative action as may be appropriate." 42 U. S. C. § 2000e-5(g).

The passage of Title VII did not preclude Congress from enacting other affirmative measures in order to overcome the effects of discrimination. The Third Circuit recognized that Title VII did not forbid the imposition of affirmative action plans under presidential authority through executive orders in *Contractors Ass'n of Eastern Pa. v. Sect. of Labor*, 442 F. 2d 159 (3d Cir. 1971):

[46]

To read § 703(a) in the manner suggested by the plaintiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention either from the language of the statute or from its legislative history.³⁶

442 F. 2d at 173. The Court also found that § 703(j) was "a limitation only upon Title VII not upon any other remedies, state or federal." 442 F. 2d at 172. Furthermore, the Supreme Court has explicitly recognized the power of Congress to enact legislation to implement the Equal Protection Clause. See *Katzenbach v. Morgan*, 384 U. S. 641, 86 S. Ct. 1717 (1966).³⁷

36. § 703(a) is found in 42 U. S. C. § 2000e-2(a).

37. Even if the Equal Rights Amendment is ratified, in which case the authors of the Brown article conclude that compensatory aid would not be permissible, those same authors nonetheless find that:

"This does not mean, however, that the government would be powerless to take measures designed to assure women *actual* as well as *theoretical* equality of rights. Authority to *remedy the effects of past discriminations* as well as to implement the provisions of the Equal Rights Amendment is available and unquestioned. Brown, *supra* note 1, at 904. (emphasis added)

I find that, because of the lack of any inconsistency between Title VII and § 228b, the latter was not repealed by implication.

[47]

VIII. CONVENING A THREE-JUDGE COURT

Where a claimant seeks to enjoin the operation of a federal statute because of an alleged violation of some provision of the Constitution, a district court must first decide whether the challenge, in this case to Section 228(b)(a)(3) of the Railroad Retirement Act of 1937 as amended, is so substantial as to warrant the convening of a three-judge court pursuant to 28 U. S. C. §§ 2282, 2284, 2285, 2286. The substantiality test here required an analysis of the Supreme Court's recent decisions in cases involving gender-based classifications in statutes, in order to ascertain whether claimant had "a reasonable chance of surviving the tide of *stare decisis*."³⁸ In light of the foregoing analysis of Supreme Court decisions, it is evident that there is no need to convene a three-judge court to consider plaintiff's claim.

[48]

IX. CONCLUSION

We are not evaluating section 228b as if Congress were passing an act today to provide pensions for persons whose rights would accrue in the year 2000. Rather, we are analyzing a statute, passed in 1945, which offered some advantage to women who had limited options at that point in this country's history.

To read plaintiff's briefs and Dr. Miller's testimony, one would infer that the history of women in America, or

38. See Memorandum Opinion, *Lewis v. Cowen*, Civil Action No. 73-2876 (E. D. Pa., filed April 21, 1975) for the applicable standards to be applied in determining whether to convene a three-judge court.

at least in the railroad industry, has been one of total parity and equal opportunity and that the conclusion of Chairman Latimer in 1945 was a figment of wild imagination. But plaintiff's position is contrary to the pages of history of which the Supreme Court has so repeatedly spoken. We must recognize that the Supreme Court moved from in 1872 considering women as "naturally timid," "delicate," and "evidently unfit" for many of the occupations of civil life³⁹ to, in 1974, the Court categorizing past deprivations as either "overt discrimination" or "the socialization process of a male-dominated culture."⁴⁰ If the Supreme Court's consciousness could be heightened and changed in a century, what made it impermissible for the Congress in 1945 to grasp the impact of those disparities which the Supreme Court has found and so eloquently described. Section 228b has since been amended to take account of what Congress considers to be a different era with heightened options for women.

[49]

Just twelve months ago, the United States Supreme Court held in *Weinberger v. Weisenfeld*, *supra*, 95 S. Ct. at 1236 (emphasis added), that a gender-based classification violates the Due Process Clause *unless* it can "be explained as *an attempt [by Congress] to provide for the special problems of women.*" § 228b of the Railroad Retirement Act is a demonstration that Congress took such "special problems" into consideration.

Plaintiff's Motion for Reconsideration is DENIED.

By THE COURT:

A. LEON HIGGINBOTHAM, JR.

39. *Bradwell v. Illinois*, *supra*, 83 U. S. at 446.

40. *Kahn v. Shevin*, *supra*, 416 U. S. at 353.

APPENDIX A3.

 UNITED STATES COURT OF APPEALS
 FOR THE THIRD CIRCUIT

 No. 76-1604

 ALBERT A. LEWIS, on behalf of himself and
 all others similarly situated,
Appellant

v.

 JAMES L. COWEN, NEIL P. SPEIRS, and WYTHE D.
 QUARLES, JR., members of the Railroad Retirement
 Board and RAILROAD RETIREMENT BOARD

 APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
 EASTERN DISTRICT OF PENNSYLVANIA
 (D. C. Civil No. 73-2876)

Argued January 7, 1977

 Before: ALDISERT and WEIS, *Circuit Judges*, and
 KNOX, *District Judge*.^{*}

 David F. Binder, Esq.
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 1845 Walnut Street
 Philadelphia, Pennsylvania 19103
Counsel for Appellant

^{*} Honorable William W. Knox, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

 David W. Marston
 United States Attorney

 Walter S. Batty, Jr.
 Assistant United States Attorney
 Chief, Appellate Section

 Kenneth A. Ritchie
 Assistant United States Attorney
 3310 United States Courthouse
 601 Market Street
 Philadelphia, Pennsylvania 19106
Counsel for Appellee

 Opinion of the Court
 (Filed January 21, 1977)

PER CURIAM.

The question is whether 28 U. S. C. § 2282¹ required the convening of a three-judge district court to hear this case. This is a class action seeking a declaration that a

1. This section was repealed by Public Law 94-381, 94th Cong. S. 537, Aug. 12, 1976. Sec. 7 of the repealing amendment provides: "This Act shall not apply to any action commenced on or before the date of enactment." The within proceedings were commenced before the date of enactment and hence come within the purview of the now repealed 28 U. S. C. § 2282 which provides:

Injunction against enforcement of Federal statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

provision of the Railroad Retirement Act² is invalid because it discriminates in favor of women pensioners, allowing women to receive full retirement benefits at a younger age than men. The disparity in benefits is alleged to be violative of the Fifth Amendment and inconsistent with Title VII of the Civil Rights Act of 1964. Although plaintiffs sought to convene a three-judge district court under § 2282, the district judge refused to convene such a court on the ground that the constitutional claim was insubstantial and went on to grant defendants' motion for summary judgment. In a careful 49 page opinion the district court denied reconsideration, and this appeal was taken.

However much we might incline towards the district court's view of the merits of this case, we cannot agree that the constitutional claim presented was "insubstantial" as that term has been defined by the Supreme Court. *Goosby v. Osser*, 409 U. S. 512 (1973), reversing this court, 452 F. 2d 39 (3d Cir. 1971), teaches that the lack of merit in a claim must be very clear indeed to warrant denial of a three-judge court when the case is otherwise within a three-judge court statute.

Title 28 U. S. C. § 2281³ does not require the convening of a three-judge court when the constitu-

2. Plaintiffs challenge the provision that was formerly 45 U. S. C. § 228b(a). Public Law 93-69, 87 Stat. 162 has amended that provision to eliminate the disparity in benefits complained of. The amendment, however, does not apply to plaintiffs because their annuities began to accrue before July 1, 1974. Only annuities beginning to accrue after that date are subject to the new rule.

3. Section 2281, which was involved in *Goosby*, requires a three-judge court when an injunction is sought on constitutional grounds against the operation of a state statute or administrative order. Section 2282, which is involved here, provides for the same procedure when an injunction is sought on constitutional grounds against the operation of a federal statute. The two provisions thus parallel each other. Both have been interpreted as inapplicable where the constitutional claim is insubstantial, and both were repealed by the Act cited in note 1, *supra*.

tional attack upon the state statutes is insubstantial. "Constitutional insubstantiality" for this purpose has been equated with such concepts as "essentially fictitious," *Bailey v. Patterson*, 369 U. S., at 33; "wholly insubstantial," *ibid.*; "obviously frivolous," *Hannis Distilling Co. v. Baltimore*, 216 U. S. 285, 288 (1910); and "obviously without merit," *Ex parte Poresky*, 290 U. S. 30, 32 (1933). The limiting words "wholly" and "obviously" have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U. S. C. § 2281. A claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Ex parte Poresky*, *supra*, at 32, quoting from *Hannis Distilling Co. v. Baltimore*, *supra*, at 288; see also *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103, 105-106 (1933); *McGivra v. Ross*, 215 U. S. 70, 80 (1909).

409 U. S. at 518.

The Supreme Court has articulated a "strong presumption" of constitutionality of laws providing for dispensation of government monetary benefits.

The basic principle that must govern an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits is well established. Governmental decisions to

spend money to improve the general public welfare in one way and not another are "not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Helvering v. Davis*, 301 U. S. 619, 640. In enacting legislation of this kind a government does not deny equal protection "merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge v. Williams*, 397 U. S. 471, 485.

Mathews v. De Castro, 45 U. S. L. W. 4049, 4050 (Dec. 13, 1976). See also *Mathews v. Lucas*, 44 U. S. L. W. 5139, 5143 (June 29, 1976). At least since *Reed v. Reed*, 404 U. S. 71 (1971), however, it has also been clear that classifications based on sex are subject to constitutional scrutiny. See, e.g., *Weinberger v. Wiesenfeld*, 420 U. S. 636 (1975); *Schlesinger v. Ballard*, 419 U. S. 498 (1975); *Frontiero v. Richardson*, 411 U. S. 677 (1973). Most recently, the Court has emphasized that its "previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 45 U. S. L. W. 4057, 4059 (Dec. 20, 1976).

In light of these pronouncements, and notwithstanding the vigor and force of the district judge's opinion on the merits of the constitutional claim, we simply cannot say that the claim was essentially fictitious, obviously frivolous, or wholly insubstantial. This court learned its lesson in *Goosby*, *supra*. Accordingly, we will decline to

adjudicate the merits of this appeal and, instead, we will vacate the judgment of the district court and remand the proceedings to be "heard and determined by a district court of three judges." 28 U. S. C. § 2282.

The judgment of the district court will be vacated and the proceedings remanded with a direction that the district court request the Chief Judge of the circuit to convene a three-judge court.

APPENDIX A4.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-2876

ALBERT A. LEWIS, *et al.*,

Plaintiffs

v.

JAMES L. COWEN, *et al.*,

Defendants

Opinion and Order

Argued May 10, 1977

Before: ROSENN, *Circuit Judge*, and Higginbotham and
Bechtle, *District Judges*.

(THREE-JUDGE DISTRICT COURT)

HIGGINBOTHAM, A. L., J.

October 11, 1977

I.

Introduction

Plaintiff, a retired male railroad employee, claims that a former provision of the Railroad Retirement Act, 45 U. S. C. § 228b(a) (hereafter § 228b(a)),¹ violates the equal protection component of the Fifth Amendment and is invalid on the ground that it was superseded by Title VII of the Civil Rights Act of 1964. § 228b(a)

1. Act of July 31, 1946, ch. 709, § 205, 60 Stat. 727.

permitted women with thirty years' service to retire at age sixty with full benefits; however, men with thirty years' service receive reduced benefits if they retired between their sixtieth and sixty-fifth birthdays. For the third time in four years a court has been asked to, within this very lawsuit, declare unconstitutional the statute in issue. Each time before plaintiff lost and at his third time at bat his fate is no better.

Plaintiff instituted a class action seeking injunctive relief, retroactive and prospective retirement annuity benefits for those male employees with thirty years of service who received reduced annuities under § 228b(a).²

On April 21, 1975 defendant's motion for summary judgment was granted by the district judge who held that the relevant provision of the Railroad Retirement Act did not unconstitutionally discriminate against retired male railroad employees, was not superseded by Title VII and that the plaintiff did not raise a sufficiently substantial issue to warrant the convening of a three-judge court. See Memorandum Opinion, *Lewis v. Cowen*, Civil Action No. 73-2876 (E. D. Pa., filed April 21, 1975).³ In an order and opinion filed March 5, 1976, the district court denied plaintiff's petition for reconsideration and vacation of the summary judgment. 417 F. Supp. 1047. An appeal was taken. In an unpublished opinion, the Court of the Appeals for the Third Circuit stated:

. . . In a careful 49 page opinion the district court denied reconsideration, and this appeal was taken.

However much we might incline towards the district court's view of the merits of this case, we can-

2. Plaintiff was granted a thirty day period, after the disposition of defendant's motion for summary judgment, to move for a determination of whether the case can be maintained as a class action. Order filed March 13, 1975, Civil Action No. 73-2876.

3. Neither plaintiff nor defendants petitioned for the convening of a three-judge court.

not agree that the constitutional claim presented was "insubstantial" as that term has been defined by the Supreme Court. *Goosby v. Osser*, 409 U. S. 512 (1973), reversing this court, 452 F. 2d 39 (3d Cir. 1971), teaches that the lack of merit in a claim must be very clear indeed to warrant denial of a three-judge court when the case is otherwise within a three-judge court statute.

Opinion filed January 21, 1977, Civil Action No. 76-1604. Consequently, the Court of Appeals vacated and remanded the case with directions that a three-judge court be convened.⁴ Defendant's motion for summary judgment is now before the court for determination. In light of the Supreme Court's recent holding in *Califano v. Webster*, — U. S. —, 97 S. Ct. 1192 (1977), any doubt as to the validity of § 228b(a) is eliminated; and, therefore, defendant's motion for summary judgment must be again granted.

II.

Railroad Retirement Act

The Railroad Retirement Act is similar to the Social Security Act in that they are both federally-administered contributory systems designed to protect the worker and, under some provisions, his family. See *Kalina v. Railroad Retirement Board*, 541 F. 2d 1204, 1207, n. 3 (6th Cir. 1976), appeal docketed, No. 76-1076, 45 U. S. L. W. 3590. There is an effort to keep the annuity benefits provided

4. We are aware that 28 U. S. C. § 2282 which required the convening of the three-judge court in this case was repealed by Public Law 94-381, 94th Cong. S. 537, Aug. 12, 1976. However, because § 7 of the repealing amendment made the act inapplicable to actions commenced on or before the date of enactment, this case which commenced in 1973 is within the purview of the now repealed 28 U. S. C. § 2282.

under the Railroad Retirement Act comparable to social security benefits. "Historically, whenever social security benefits have been increased, railroad retirement benefits have also been increased comparably." 1973 U. S. Congressional and Administrative News 1617. Because of the similarity between these benefit systems, there is no reason to doubt the applicability of case law regarding the Social Security Act to claims against the Railroad Retirement Act.⁵

III.

Equal Protection Claim

Plaintiff's ability to bring this claim under the Fifth Amendment is without question. The existence of an equal protection component to the Fifth Amendment's due process clause is well established. *Bolling v. Sharpe*, 347 U. S. 497 (1954); *Matthews v. de Castro*, — U. S. —, —, n. —, 97 S. Ct. 431, 432, n. 1 (1976).

Plaintiff does not allege that § 228b(a) discriminates against women or has an adverse impact upon them. Thus, this case is not comparable to the circumstances of *Weinberger v. Wiesenfeld*, 420 U. S. 636, 95 S. Ct. 1225 (1975), or *Califano v. Goldfarb*, *supra*, n. 5, where the Court held certain provisions of the Social Security Act unconstitutional because they deprived female wage earners of the protections accorded to their male counterparts. However,

5. In *Califano v. Goldfarb*, — U. S. —, 97 S. Ct. 1021 (1977), the Court may have indicated that the gender classification in the old-age benefit provisions of the Social Security Act would also be held unconstitutional by the Court under the Railroad Retirement Act. Of course, that provision, imposing a dependency requirement on husbands of covered wage earners, was held violative of the constitutional rights of female workers in that it denied them the protection accorded to male wage earners. Thus, the claim raised in *Kalina*, *supra*, is inapplicable in this case involving a significantly different provision.

plaintiff's action does come within the purview of *Califano v. Webster, supra*, in which the gender classification of the former § 215 of the Social Security Act, 42 U. S. C. § 415, provided, in effect, greater old-age benefits under the Social Security Act to retired females than to their male counterparts. After analyzing the provision under the standard of review applicable to gender classifications, which was most clearly articulated in *Craig v. Boren*, — U. S. —, 97 S. Ct. 451 (1976), the court held § 215 constitutional.

The standard of review applicable here in determining if § 228b(a) is constitutional is whether the gender classification is substantially related to the achievement of important governmental objectives. *Craig v. Boren*, — U. S. —, —, 97 S. Ct. 451, 457 (1976). A gender-based classification enacted for the purpose of reducing the disparity between the economic conditions of men and women caused by the historic discrimination against women has been recognized as an important governmental objective capable of withstanding scrutiny under equal protection analysis. *Califano v. Webster, supra*; *Schlesinger v. Ballard*, 419 U. S. 498 (1975); *Kahn v. Shevin*, 416 U. S. 351 (1974).

Defendant claims that § 228b(a) was enacted to redress the effects of past discrimination against women. However, in determining whether an asserted compensatory purpose is not a "mere recitation of a benign compensatory purpose," *Weinberger v. Wiesenfeld*, 420 U. S. 636, 648 (1975), this court must inquire into the actual purpose underlying the sex-based classification presently at issue. In the legislative history of § 228b, this court finds a substantial basis for recognizing the remedial purposes of § 228b.

The most significant part of the legislative history of § 228b is the January 31, 1945 testimony of Murray W.

Latimer, then Chairman of the Railroad Retirement Board, before the House Committee on Interstate and Foreign Commerce. In discussing the suggested amendment to § 228b of the Railroad Retirement Act, the precursor to the provision now at issue, Latimer stated:

[S]pecial provision for women is appropriate. There is much evidence that, despite the greater longevity of women as compared with men, their efficiency on jobs outside the home tends to become impaired at an earlier age than in the case of men. In its report for 1943, the Social Security Board stated that there was "little doubt that the proportion of women unable to engage in regular employment at age 60 is larger than the proportion of men at age 65. Most pension systems of private employers, having any substantial number of women workers, make provision for retiring women at an earlier age than male employees. The Social Security Board has recommended that income benefits for women under the old-age and survivors' insurance system begin at 60. The provision in H. R. 1362 does not go as far as the recommendation of the Social Security Board; I think it an appropriately cautious step in the right direction.

Hearings on H. R. 1362 Before the Committee on Interstate and Foreign Commerce, 70th Congress., 1st Sess., pt. 1, at 50 (1945) (hereafter "Hearings"). Through the testimony of Chairman Latimer, the legislative history shows that the statute was based, in part, upon the finding that a greater proportion of women were unable to continue working past age sixty than men who could continue working past age sixty-five. Thus, retired female employees were to be provided full annuity benefits when they reached the age when female workers "normally cease to seek employment." Hearings, at 135-136.

The district judge, after surveying the legislative history of § 228b(a) concluded:

Congress' purpose in enacting § 228b was to decrease "disparity between the economic capabilities of a man and a woman" employed in the railroad industry [citations omitted].

We agree with the district judge and find that the legislative history is sufficiently specific to reveal its remedial purpose. We cannot now resort to explicit legislative materials to show that Congress intended to remedy the effects of past discrimination when it enacted the relevant provisions of Sec. 228b in 1946. Yet, to require such specificity from statutes enacted long before the development of modern equal protection analysis could render many of them needlessly unconstitutional.

Like the Supreme Court in *Kahn v. Shevin*, *supra*, we take note of available labor statistics which, in this case, show the presence of discrimination in the railroad industry. In reviewing these statistics, the district judge found:

Women were a strikingly small proportion of railroad employees. . . . Furthermore, the data demonstrated that the railroad industry had been no oasis in that desert of higher-paying jobs for women. During the year when Chairman Latimer testified, the data indicated that women were less than two tenths of one percent of the executives, officials and staff assistants, less than three percent of the professional assistants, and approximately two percent of the supervisors or clerks, even though they constituted approximately eight percent of the total work force. As recently as 1970, women were less than one and one-half percent of the executives, officials and staff assistants, and less than four percent of the supervisors and professionals. In addition, there was a fifteen to twenty percent wage

differential between male and female employees in the railroad industry. [footnote and citation omitted].

Calculation of annuity payments has been based on the average monthly compensation of a railroad employee. The average monthly compensation for railroad employees who subsequently became annuitants was higher for male workers in every year for which such statistics were kept by the Railroad Retirement Board. Defendants' Supplemental Memorandum, at Appendix A.

417 F. Supp. at 1061, 1062.

After noting these realities we recognize the existence of discrimination in the railroad industry even though no explicit finding was made by Congress. In doing this, we are taking cognizance of the Supreme Court's statement in *Califano v. Webster*, 97 S. Ct. at 1195.

"[w]hether from overt discrimination or from the socialization process of a male-dominated culture, the job market in inhospitable to the woman seeking any but the lowest paid jobs." *Kahn v. Shevin*, *supra*, 416 U. S. at 353. See generally *id.*, at 353-354, and nn. 4-6.

Even if we were not willing to recognize the existence of discrimination in the railroad industry at the time § 228b was enacted, the Congressional purpose of reducing economic disparity is, itself, an acceptable "important governmental objective." In fact, after reviewing the facts of *Kahn v. Shevin*, *supra*, and *Califano v. Webster*, *supra*, it is questionable that the Supreme Court makes any distinction between a finding of discrimination and one of economic disparity. For example, in *Califano v. Webster*, *supra*, the Court states:

Reduction of the disparity in economic condition between men and women caused by the long history of

discrimination against women has been recognized as such an important governmental objective. 97 S. Ct. 1194.

Both *Kahn v. Shevin*, *supra*, and *Schlesinger v. Ballard*, *supra*, are cited as supporting this proposition. Yet, in *Kahn v. Shevin*, *supra*, there was no explicit finding of either past discrimination or a legislative intent to remedy such discrimination. The statute, allowing for a tax exemption for widows, was of the type which had been operative in Florida since 1885. Also, the Court looked at labor statistics post-1955 to show the problems of women in the labor market. Here, where there was no explicit legislative finding of past discrimination under the *Kahn v. Shevin*, *supra*, analysis as adopted by *Califano v. Webster*, *supra*, a finding of economic disparity is capable of withstanding scrutiny under equal protection analysis as an important governmental objective.

Plaintiff claims that § 228b(a) was enacted on an "erroneous belief" as to the employability of women after the age of sixty. Plaintiff's brief at 25. Yet, in support of this proposition he utilizes statistical evidence and expert testimony largely unrelated to the relevant economic conditions present and capable of being analyzed by Congress at the time § 228b(a) was enacted. This fact was pointedly addressed by the district judge:

To refute the defendant's contention that men and women were not similarly situated, either in the railroad industry or in the total work force, plaintiff relies predominantly on statistics from an era 22 years after Chairman Latimer had testified and Congress had passed the statute in issue.

... I cannot find that Congress committed a constitutional error when rejecting [plaintiffs' expert] Dr.

Miller's view of parity between men and women in the railroad industry. Fortunately for women, today, the disparity is not as great as it was in 1945, but to assume that the millenium has been reached requires both naivete and obliviousness to data.

417 F. Supp. at 1062-1063.

Plaintiff also contends that § 228b(a) was, in fact, based upon outdated notions or assumptions about women. However, as we have found the purpose of § 228b(a) to be remedial in nature and an attempt to redress the economic conditions of women in the railroad industry, we cannot agree that the classification was based upon assumption of "archaic and overbroad" generalizations. *Schlesinger v. Ballard*, 419 U. S. at 508. Nor do we find any evidence of "the role-typing society has long imposed" upon women, *Stanton v. Stanton*, 421 U. S. 7, 15 (1975). As to the possibility that Congress could have made a casual assumption that women were the "weaker sex," one should look at a provision in the Railroad Unemployment Insurance Act which was amended by the same bill that amended § 228b. There, Congress provided for maternity benefits which would provide income to the expectant mother for a period before and after the birth of the child in order to coincide with the national interest "against . . . expectant mothers either to engage in employment practically up to the time of childbirth or to return quickly to employment after childbirth." Hearings, *supra* at 77. This testimony, again that of Chairman Latimer, revealed the intent to aid the expectant mother and provides an inference that Congress believed that the mother would eventually return to employment. Here again, Congress apparently looked to the individual needs and conditions of women in the industry rather than referring to any outdated notions or assumptions about women.

In recognition of *the diminished economic capabilities of women in the railroad industry* after age sixty, a statute enabling women to retire from the industry after age sixty with full benefits is "substantially related" to the remedial purposes of the provision. § 228b(a) was tailored to the "particular needs" of women in the industry and the distinctions were eliminated when no longer necessary. Act of July 10, 1973, Pub. L. No. 93-69, Title I, § 101, 87 Stat. 162. Because the purpose of § 228b(a) was *not* to generally address the past economic discrimination against women or to generally help female railroad employees, plaintiff cannot criticize the limited impact of the statute. Plaintiff's brief, at 23. Actually, the fact that the different treatment was *only* accorded to women who retired with thirty years service, without disability and between the ages of sixty and sixty-four attests to the statute's success in accomplishing its specific goals. Also, it is well established that Congress can act in selected areas, even where one might find a legitimate need elsewhere. *Jefferson v. Hackney*, 406 U. S. 535, 547, 92 S. Ct. 1724, 1731 (1972).

While we find the gender-based classification of § 228b(a) quite capable of withstanding the analysis mandated in *Craig v. Boren, supra*, we seriously doubt whether male and female employees in the railroad industry were similarly situated. Congress, in enacting § 228b(a), could be said to have treated "different classes of persons in different ways;" and therefore, the statute is constitutional under traditional equal protection analysis. As Chief Justice Burger stated in the Court's opinion in *Reed v. Reed*, 404 U. S. 71, 75, 92 S. Ct. 251, 253 (1971):

... this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. [citations omitted].

Nor is the federal government denied this power under the Fifth Amendment.

The legislature may have concluded that women were dissimilar because they were less capable of engaging in regular employment at the age of sixty than men at age sixty-five and that providing for a lower retirement age for women would tailor the benefit system to the particular needs of women who would otherwise receive less than their male counterparts. The legislative justification, similar to that made in *Schlesinger v. Ballard*,* *supra*, would be a sufficient basis for a variation in the treatment by the railroad industry of men and women who reach the age of sixty.

The legislative history of § 228b(a) shows that while the statute called for the different treatment of males and females, it was not deemed discriminatory as to retired male employees. Chairman Latimer testified:

Because it fits, as far as it goes, the peculiar needs of women workers, *it can hardly be said to involve any element of discrimination in favor of women over men.* Hearings, *supra* at 50 (emphasis added).

Thus, Congress, in relying on reported facts descriptive of the *then* employment pattern of women, had a sufficient basis for enacting a statute to provide for different treatment of dissimilarly situated persons.

* In *Schlesinger v. Ballard, supra* at 508-509, the Supreme Court spoke of the possible legislative justification for the gender-based statute at issue there:

Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with "fair and equitable career advancement programs."

Congressional decisions regarding the distribution of funds under statutory social welfare schemes are entitled to deference. *Califano v. Goldfarb*, — U. S. —, —, 97 S. Ct. 1021, 1028-1029 (1977). While the use of gender classifications in these schemes is subject to constitutional attack under the equal protection component of the Fifth Amendment, in this case, plaintiff's claim that § 228b(a) is, as a matter of law, unconstitutional is without merit.

IV.

Application of Title VII to § 228b.

The Railroad Retirement benefit system, a federally enacted social insurance program, is not equivalent to a pension plan; therefore, the benefit system is not subject to Title VII. Plaintiff cannot rely on cases involving ordinary pension or retirement plans to infer a claim under Title VII. See *Rosen v. Public Service Electric and Gas Co.*, 477 F. 2d 90 (3d Cir. 1973); *Bartmess v. Drewrys U. S. A., Inc.*, 444 F. 2d 1187, cert. denied, 404 U. S. 939 (1971); *Fitzpatrick v. Bitzer*, 390 F. Supp. 278 (D. Conn. 1974), modified, 519 F. 2d 559 (2d Cir. 1975), rev'd in part, aff'd in part, 427 U. S. 445 (1976).

Moreover, this court does not agree with the plaintiff's contention that Title VII and the relevant provisions of the Railroad Retirement Act are incompatible. Plaintiff's brief at 27. As was stated by the district judge, there is no inconsistency between the statutory provisions. Both acts provide mechanisms for redressing the disparate conditions of victims of past discrimination. *Lewis v. Cowen*, 417 F. Supp. at 1066. Therefore, we cannot find that Title VII of the Civil Rights Act impliedly repealed the relevant provisions of § 228b.

V.

After a review of all that has been said and written in this area, we are convinced that the judgment on the merits as expressed by the district court judge in his opinion of March 5, 1976, is still valid and it has been corroborated by the subsequent opinion of the Supreme Court in *Califano v. Webster, supra*.

We are not evaluating section 228b as if Congress were passing an act today to provide pensions for persons whose rights would accrue in the year 2000. Rather, we are analyzing a statute, passed in 1945, which offered some advantage to women who had limited options at that point in this country's history.

To read plaintiff's briefs and Dr. Miller's testimony, one would infer that the history of women in America, or at least in the railroad industry, has been one of total parity and equal opportunity and that the conclusion of Chairman Latimer in 1945 was a figment of wild imagination. But plaintiff's position is contrary to the pages of history of which the Supreme Court has so repeatedly spoken. We must recognize that the Supreme Court moved from in 1872 considering women as "naturally timid," "delicate," and "evidently unfit" for many of the occupations of civil life⁶ to, in 1974, the Court categorizing past deprivations as either "overt discrimination" or "the socialization process of a male dominated culture."⁷ If the Supreme Court's consciousness could be heightened and changed in a century, what made it impermissible for the Congress in 1945 to grasp the impact of those disparities which the Supreme Court has found and so eloquently described. Section 228b has since been amended to take account of

6. *Bradwell v. Illinois*, 83 U. S. 130, 139 (1873).

7. *Kahn v. Shevin*, 416 U. S. at 353.

what Congress considers to be a different era with heightened options for women.

Over two years ago, the United States Supreme Court held in *Weinberger v. Wiesenfeld*, *supra*, 420 U. S. at 653, 93 S. Ct. at 1236, 43 L. Ed. 2d at 528 (emphasis added), that a gender-based classification violated the Due Process Clause *unless* it can "be explained as an *attempt* (by Congress) *to provide for the special problems of women*." § 228b of the Railroad Retirement Act is a demonstration that Congress took such "special problems" into consideration.

Defendant's motion for summary judgment is granted; plaintiff's motion for summary judgment is denied.⁸

By THE COURT

C.J.

A. LEON HIGGINBOTHAM, JR., J.

LOUIS C. BECHTLE, J.

8. Although technically plaintiff did not file a motion for summary judgment, he requested that such motion be granted in his favor. Memorandum, filed October 29, 1974, Civil Action No. 73-2876.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-2876

ALBERT A. LEWIS, *et al.*,

Plaintiffs

v.

JAMES L. COWEN, *et al.*,

Defendants

Order

Argued May 10, 1977

Before: ROSENN, *Circuit Judge*, and Higginbotham and Bechtle, *District Judges*.

(THREE-JUDGE DISTRICT COURT)

AND NOW, this 11th day of October, 1977, consistent with the foregoing opinion, it is hereby

ORDERED, ADJUDGED and DECREED that the defendant's Motion for Summary Judgment is GRANTED.

By THE COURT:

C.J.

A. LEON HIGGINBOTHAM, JR., J.

LOUIS C. BECHTLE, J.

APPENDIX A5.

Concurring Opinion

ROSENN, *Circuit Judge*, Concurring

I concur with the majority in all respects that section 228b(a) of the Railroad Retirement Act was not superseded by Title VII of the Civil Rights Act of 1964. This holding is supported by Congress' later explicit repeal of section 228, subsequent to the passage of the Civil Rights Act. I also concur with the majority that section 228 is constitutional, but wish to state separately my reasons.

The majority and I start with the same basic standard of review for equal protection challenges to legislation classified on the basis of gender. *Craig v. Boren*, 429 U. S. 190 (1976), teaches that, "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." 429 U. S. at 197. The majority holds that section 228 "was enacted for the purpose of reducing the disparity between the economic conditions of men and women caused by the historic discrimination against women," and that this purpose should be held constitutional as serving important governmental objectives. See *Califano v. Webster*, U. S. , 97 S. Ct. 1192 (1977). I believe, however, that the legislative history demonstrates that section 228 was not passed to remedy any past economic discrimination against women, but rather was enacted because Congress believed at that time that women would leave the work force earlier than men. Because section 228 is "benign" in purpose and effect on women and the dis-

crimination against men is incidental to the overall important governmental objectives, I would hold the statute constitutional.

The legislative history demonstrates that section 228 was passed to provide retirement benefits to women at an earlier age than men because studies undertaken at the time of its passage and Congressional testimony indicated that women left the work force earlier than men. Whether women, in fact, left the work force because of discrimination or any other factor, or whether the studies and testimony were accurate, is irrelevant to our review of the statute, for Congress could have fairly and legitimately believed such evidence and, in response, properly provided benefits for women unavailable to men. As pointed out by the majority, that Congress has now repealed section 228 only indicates that once the underlying basis for the law disappeared, Congress terminated the law.

This case thus falls squarely within the rule of *Schlessinger v. Ballard*, 419 U. S. 498 (1975), and *Kahn v. Shevin*, 416 U. S. 351 (1974), which rejected challenges by men of statutes enacted to redress perceived imbalances in the opportunities provided for men and women. Unlike *Weinberger v. Weisenfeld*, 420 U. S. 636 (1975), in which a gender-based generalization perniciously denigrated the efforts and earnings of women thereby depriving them of the protection which men received as a result of their employment, this statute serves a benign purpose and is reasonably designed to further Congressional policy to reduce the adverse effects on women caused by their earlier separation than men from the work force. Coupled with the district court's finding of historical discrimination against women in the railroad profession, I believe the statute is constitutional.

APPENDIX B1.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-2876

ALBERT A. LEWIS, ET AL.

v.

JAMES L. COWEN, ET AL.

Civil Judgment

AND NOW, this 19th day of October 1977, in accordance with the Court's Opinion and Order

IT IS ORDERED that Judgment be and the same is hereby entered in favor of Defendants, James L. Cowen, et al. and against Plaintiffs Albert A. Lewis, et al.

By THE COURT:

MAX ROSENN, C.J.
A. LEON HIGGINBOTHAM, JR., J.
LOUIS C. BECHTLE, J.

APPENDIX B2.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-2876

ALBERT A. LEWIS, on behalf of himself and all
others similarly situated

v.

JAMES L. COWEN, NEIL P. SPEIRS and WYTHE D.
QUARLES, JR., members of the Railroad Retirement
Board, and RAILROAD RETIREMENT BOARD.

Notice of Appeal

Filed November 11, 1977

Plaintiff appeals from the judgment entered by the United States District Court for the Eastern District of Pennsylvania (three judge court convened pursuant to 28 USC § 2282) on October 11, 1977. This appeal is taken pursuant to 28 USC § 1253.

RAYNES, MCCARTY & BINDER
By DAVID F. BINDER
Counsel for Appellant

No. 77-980

Supreme Court, U. S.
FILED

MAR 21 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

ALBERT A. LEWIS, ETC., APPELLANT

v.

JAMES L. COWEN, ET AL.

**ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA**

MOTION TO AFFIRM

**WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-980

ALBERT A. LEWIS, ETC., APPELLANT

v.

JAMES L. COWEN, ET AL.

*ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA*

MOTION TO AFFIRM

The Solicitor General, on behalf of appellees,¹ moves that the judgment of the district court be affirmed.

1. Appellant is a former railroad employee who retired in 1964 at the age of 64. Since his retirement, he has received benefits from the Railroad Retirement Board, which makes old age insurance payments to retired railroad employees. Because appellant retired before his 65th birthday, his benefits were reduced slightly under the Railroad Retirement Act of 1937, as amended by 60 Stat. 727, 45 U.S.C. (1970 ed.) 228b(a), which required a reduction of 1/180 in the payments for each month before his 65th birthday that a man retires. No employee covered by the statute could retire before age 60, but the benefits of women who retired between age 60 and age 65 were not reduced.

¹The Railroad Retirement Board and its members are the appellees.

In 1973 Congress eliminated the disparate reduction of benefits for men who retire between 60 and 65; consequently, persons such as appellant who have retired since 1974 or who will retire in the future receive the same benefits as women do.² Appellant, however, continues to receive reduced benefits, because he retired before 1974. He contends that the reduction of his benefits violates both the equal protection component of the Due Process Clause ~~on~~ Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e *et seq.*

2. The judge to whom the case was referred declined to convene a three-judge district court and held that appellant had not raised a substantial constitutional question. The court granted summary judgment against appellant (J.S. App. 1A-7A). On motion for reconsideration, the district court wrote a thorough opinion explaining and adhering to its position (417 F. Supp. 1047; J.S. App. 8A-53A). The court of appeals vacated that decision, holding that a three-judge district court should have been convened because appellant's claim was not wholly insubstantial or essentially fictitious (547 F. 2d 1162; J.S. App. 54A-59A).

Before the three-judge court considered the case, however, this Court decided *Califano v. Webster*, 430 U.S. 313, which rejected a constitutional challenge to a provision of the Social Security Act that gave women who retired before age 65 slightly greater retirement benefits than it gave similarly-situated men. Relying on *Webster*, the three-judge district court granted summary judgment against appellant (J.S. App. 60A-78A). The district court also rejected appellant's claim that the Railroad Retirement Act had been repealed by implication by Title VII.

²See 88 Stat. 1312, 45 U.S.C. (Supp. V) 231a(a).

3. The constitutional issue presented is whether the distinction between men and women in this case violates the equal protection guarantee of the Due Process Clause of the Fifth Amendment. That issue is squarely controlled by *Webster*. *Webster* held that a provision giving women greater Social Security benefits than men was constitutional because it served the important objective of compensating women for past discrimination against them. 430 U.S. at 317-320.

As the district court held here, the analysis of *Webster* requires rejection of appellant's constitutional claim.

The statute at issue here was enacted in 1946, and the district court found that the legislative history provides "a substantial basis for recognizing the remedial purposes" of the statute (J.S. App. 64A). The court relied on testimony of Murray W. Latimer, then Chairman of the Railroad Retirement Board, which demonstrated that "a greater proportion of women were unable to continue working past age sixty than men who could continue working past age sixty-five" (*id.* at 65A); the court found that "Congress' purpose in enacting §228b was to decrease disparity between the economic capabilities of a man and a woman employed in the railroad industry" (*id.* at 66A; internal quotation marks omitted). See *Webster, supra*, 430 U.S. at 317 ("[T]he only discernible purpose of §215's more favorable treatment is the permissible one of redressing our society's longstanding disparate treatment of women" (brackets omitted)).

The district court also was influenced by the evidence of discrimination against women at the time Congress enacted Section 228b (J.S. App. 66A):

During the year when Chairman Latimer testified, the data indicated that women were less than two tenths of one percent of the executives, officials and

staff assistants, less than three percent of the professional assistants, and approximately two percent of the supervisors or clerks, even though they constituted approximately eight percent of the total work force.

The district court observed (*id.* at 67A) that: "Even if we were not willing to recognize the existence of discrimination in the railroad industry at the time §228b was enacted, the Congressional purpose of reducing economic disparity is, itself, an acceptable 'important governmental objective.'" It concluded that, "[i]n recognition of the *diminished economic capabilities of women in the railroad industry* after age sixty, a statute enabling women to retire from the industry after age sixty with full benefits is 'substantially related' to the remedial purposes of the provision" (*id.* at 70A; emphasis in original).

The district court's opinion is thorough and careful, taking guidance at each step from *Webster* and its predecessors. The decision should be affirmed without plenary review. The Railroad Retirement benefit program is a social insurance scheme very much like Social Security. See J.S. App. 62A-63A. Like the Social Security provisions upheld in *Webster*, the Railroad Retirement Act provides slightly more favorable treatment to women who retire after 60 but before 65. In *Webster* women were allowed to disregard more low-earnings years than men, and here women may retire without the reduction in benefits that men incur. Here, as in *Webster* (430 U.S. at 318):

The challenged statute operated directly to compensate women for past economic discrimination. Retirement benefits under the Act are based on past earnings. But as we have recognized: "Whether from overt discrimination or from the socialization process

of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paying jobs." *Kahn v. Shevin*, 416 U.S. at 353.

Appellant does not attempt to distinguish *Webster*. He contends only that men "continue to suffer, solely because of their sex, a reduction in pension payments" (J.S. 13). Under the circumstances of this case and the principles of *Webster*, however, the disparate treatment is not unlawful.³

4. Appellant also contends (J.S. 13-14) that Title VII of the Civil Rights Act of 1964 implicitly repealed the gender distinction of the Railroad Retirement Act. Even assuming *arguendo* that Title VII would prevail if there were a conflict between the statutes, there is no conflict, for Title VII applies only to the practices of an employer, 42 U.S.C. 2000e-2(a). 42 U.S.C. (Supp. V) 2000e-16. The Railroad Retirement Act is a social insurance plan administered by the government. The government does not act as an "employer," nor do the former employers of the railroad workers administer the benefit system.⁴

Moreover, as we have shown, Congress enacted the special treatment of women in this case because of its

³The statistical evidence presented at J.S. 7-12 was properly discounted by the district court as "largely unrelated to the relevant economic conditions present and capable of being analyzed by Congress at the time §228b(a) was enacted" (J.S. App. 68A). Similar considerations concerning changing employment patterns may have influenced Congress' decision to repeal the statute, but the repeal does not indicate that the statute was unconstitutional, and present economic conditions cannot retroactively invalidate an Act of Congress. See *Webster*, *supra*, 430 U.S. at 320-321.

⁴The question whether an "employer" that contracted with an insurance company to provide retired employees with disparate benefits of the sort at issue here would violate Title VII is not presented by this case, because appellant's employer had no choice but to participate in the program adopted by Congress.

desire to compensate women for past economic disadvantages. This narrowly drafted remedy for past discrimination should not give way simply because Congress later added another more general remedy. Finally, Congress itself has amended the Railroad Retirement Act to eliminate the gender distinction, a step indicating Congress' belief that Title VII did not affect the Railroad Retirement Act.

It is therefore respectfully submitted that the judgment of the district court should be affirmed.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1978.